SUPREME COURT, U.S.

08-859 FILED 2008

114 (1)

No.

IN THE

Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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December 16, 2008

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QUESTION PRESENTED

This case arises from the denial of a motion for a preliminary injunction brought by respondent Levisa Coal Company. At the close of Levisa's presentation of evidence on its motion, the trial court granted petitioner Consolidation Coal Company's request to deny the motion because Levisa had failed to prove it would suffer irreparable harm. The trial court also dismissed Levisa's complaint. For that reason, Consolidation had no need to present evidence or assert its affirmative defenses. On appeal, the Virginia Supreme Court held that the trial court erred in denying Levisa's motion for a preliminary injunction and dismissing its complaint. Instead of simply vacating the trial court's order and remanding for further proceedings on the merits, however, the court decided a critical substantive issue on the merits of the case in favor of Levisa. The court did so based solely on the one-sided record created in the curtailed preliminary injunction hearing, which contained only evidence introduced by Levisa. The record did not include key documents that petitioner Consolidation would have put forward if the trial court had proceeded with a complete hearing. The question presented is:

Whether the Virginia Supreme Court violated petitioner Consolidation's rights under this Court's settled reading of the Due Process Clause of the Fourteenth Amendment by entering a judgment on the merits against Consolidation when Consolidation had never been given an opportunity to present evidence in its defense or to raise its affirmative defenses?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Consolidation Coal Company states as follows:

Consolidation Coal Company is a wholly-owned subsidiary of CONSOL Energy, Inc., a publicly-traded company. No publicly-held company owns 10% or more of the stock of CONSOL Energy, Inc.

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INTRODUCTION

This case involves a simple, yet fundamental, issue—the right of a party to present evidence in its own defense before being deprived of a property right. As this Court has held for over one hundred years, a state court decision that precludes such an opportunity to be heard violates the Due Process Clause of the Fourteenth Amendment. *See Saunders v. Shaw*, 244 U.S. 317 (1917); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *see also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930).

The Virginia Supreme Court violated that longstanding precedent in this case. The court ruled that petitioner Consolidation Coal Company had no right to store water from its mining operations in a mine leased by its subsidiary from respondent Levisa Coal Company. But it made that ruling based on the record of a truncated preliminary injunction hearing during which only Levisa had presented evidence. After the close of Levisa's evidence in support of its motion, Consolidation moved to deny relief because Levisa had failed to prove irreparable harm. The trial court granted this motion and denied the injunction. The court then also entered judgment for Consolidation and dismissed Levisa's complaint on the merits. Consolidation thus had no opportunity, or need, to put on its defense, which would have included two critical documents that are necessary to understand the lease agreement and affirmative defenses.

The Virginia Supreme Court reversed. But instead of merely vacating the trial court's order and remanding for further proceedings, the Virginia Supreme Court went further and decided a central

issue in the case on the merits—how to interpret the lease agreement—based solely on the evidence presented by Levisa. For the remand, the Virginia Supreme Court suggested that the only remaining issue would be remedy (whether a permanent injunction was warranted). In reaching that result, the Virginia Supreme Court deprived Consolidation of its opportunity both to present evidence in support of its interpretation of the lease agreement and to present its affirmative defenses to Levisa's claims.

That ruling violated the longstanding precedent of this Court. *See Saunders*, 244 U.S. at 319; *Windsor*, 93 U.S. at 277. Indeed, this case is virtually an exact replica of *Saunders*. In *Saunders*, a state trial court had entered judgment for the defendant at the close of an injunction hearing based on the plaintiff's failure to prove its case. The state appellate court reversed and ruled against the defendant on the merits of the case, despite the fact that the defendant had had no opportunity to present evidence in its own defense. *Id.* at 319. This Court reversed, holding that the state court's failure to afford the defendant an opportunity to be heard violated the Due Process Clause. *Id.* at 320.

Here, by deciding a critical issue in the case on the merits, rather than remanding to the trial court so that Consolidation could present its defense, the Virginia Supreme Court violated Consolidation's due process rights in direct contravention of *Saunders*. For this reason, Consolidation respectfully requests that this Court grant the writ and reverse.

OPINIONS BELOW

The Supreme Court of Virginia's opinion, *Levisa Coal Co. v. Consolidation Coal Co.*, 662 S.E.2d 44 (Va. 2008), is reprinted at App. 2a–29a. The order of the trial court is reprinted at App. 30a–31a. The transcript of the trial court's oral ruling is reprinted at App. 32a–38a.

JURISDICTION

The Supreme Court of Virginia rendered its decision on June 6, 2008. App. 2a. Consolidation filed a timely petition for rehearing that was denied on September 18, 2008. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment provides in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Background

This case arises out of a dispute between respondent Levisa Coal Company and petitioner Consolidation Coal Company over the storage of mine water, which is water that naturally occurs as a result of mining operations. Consolidation has been storing mine water produced from its mining operations in Buchanan County, Virginia in an inactive mine void known as the "VP3 mine." App.

5a–6a. The underlying question before the state court was whether Consolidation had the right to store the water in the VP3 mine under a 1956 lease agreement between Levisa and Consolidation's subsidiary (the "1956 Lease"). The 1956 Lease conveyed rights to the VP3 mine and the surrounding mining areas (known as the "Buchanan parcels"). Interpreting the 1956 Lease requires looking not only at the lease agreement itself, but also at other deeds and leases in the chain of title that are expressly referenced in the 1956 Lease.

The first document necessary to understand Consolidation's rights is a deed executed in 1908 (the "1908 Deed"). The 1908 Deed conveyed to the predecessor-in-interest of the Prater Coal Land Company the rights to "all coal, oil, and gas and other minerals" in the Buchanan parcels. In addition, the 1908 Deed conveyed the right of

> ingress, egress and passage over, through and under the surface of the said several tracts of land, for the purposes of mining and removing all the coal, oil and gas from said tract, as from *the other lands mined* by the said party of the second part [Prater], *or assigns*.

App. 50a (emphasis added).[1] Importantly, the 1908 Deed also granted rights

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[1] As explained below, neither the 1908 Deed nor the Pobst/Combs Deed is part of the record below—that is part and parcel of the very due process violation Consolidation is asserting here. *See infra* pp. 12–16. Relevant portions of all pertinent agreements are reproduced in the Appendix.

> over and under the surface of said tract of land, as may be necessary for removing the said coal or other minerals, *from this and any other lands mined or leased by the said party of the second part or assigns*, and for other purposes incident to the operations herein contemplated.

App. 51a–52a (emphasis added). The 1908 Deed thus granted the right not only to mine the Buchanan parcels, but also the right to use the land as necessary to mine "any other lands mined or leased." *Id.*

In 1937, H. Claude Pobst and F.H. Combs obtained the rights to the Buchanan parcels for use by their company—the Levisa Coal Corporation (now Levisa Coal Company). First, Pobst and Combs obtained by deed all of the rights to the land that Prater Coal had obtained in the 1908 Deed. This deed (the "Pobst/Combs Deed") provided:

> It is the intention of the deed to convey and the said party of the first part does hereby convey unto the said parties of the second part all of the real estate, *together with all rights and easements appurtenant o[r] incident thereto, owned by said party of the first part* in Buchanan County, Virginia, whether hereinbefore mentioned and described or not.

App. 48a (emphasis added). The Pobst/Combs Deed thus transferred "all rights and easements" obtained by Prater Coal in the 1908 Deed, including the absolute right to use the land as necessary to mine the Buchanan parcels "and any other lands mined or leased."

Pobst and Combs immediately deeded the rights they had obtained over the Buchanan parcels to Levisa (the "1937 Deed"). App. 3a; *see also* App. 44a–46a. The 1937 Deed grants and conveys to Levisa Coal Corporation "all the coal, metals and timber, *together with all rights, privileges and easements incident thereto which were acquired*" by Pobst and Combs from Prater Coal. App. 45a–46a (emphasis added); *see also* App. 3a. The 1937 Deed plainly evidences the intent to transfer to Levisa *all* of the rights Pobst and Combs obtained in their deed, including the right to use the land as necessary to facilitate the mining of other lands.

In 1956, Levisa entered into the 1956 Lease with Island Creek Coal Company. App. 39a–43a. In addition to granting Island Creek the right to mine and remove coal from the leased areas, *see* App. 4a–5a, the 1956 Lease gave Island Creek the right "generally, to make any use of the leased premises which [Island Creek] may deem needful or convenient in carrying on its mining or other operations." App. 41a; *see also* App. 4a. This specifically *included* the right to "dump water or refuse on said premises." App. 41a.

Of course, the 1956 Lease conveyed to Island Creek only the rights that Levisa "owns and has the right to lease." App. 42a. But reading the 1956 Lease in conjunction with the other relevant documents in the chain of title, including the 1937 Deed, the Pobst/Combs Deed and the 1908 Deed, it is clear that Levisa (and its lessee Island Creek) had the right not only to remove coal from the leased premises, but also to use those areas to facilitate its removal of coal "from . . . any other lands mined or

leased by the said party or assigns" and "for other purposes incident to the operations herein contemplated." App. 51a–52a.

In 1993, CONSOL Inc. (now CONSOL Energy, Inc.) acquired Island Creek and all of its assets, including its rights under the 1956 Lease. App. 6a. Island Creek is now a subsidiary of petitioner Consolidation (which itself is a subsidiary of CONSOL Energy). Consolidation has active mining operations near the VP3 mine. App. 6a. As is common in mining, Consolidation's mining operations create a large amount of mine water that must be pumped out of the mine. App. 7a. Initially, Consolidation deposited the excess mine water into the nearby Levisa River. App. 7a. When this solution became untenable, Consolidation designed an alternative system whereby the excess mine water would be pumped into a series of abandoned mine voids once operated by Island Creek, including the VP3 mine, pursuant to a written agreement with Island Creek. App. 7a–8a. It was undisputed below that the VP3 mine has been idled and that mining in the VP3 mine "is not presently economically feasible." App. 6a. Consolidation actually began pumping mine water into the VP3 mine in 2006. App. 8a.

B. Procedural History

Notwithstanding Consolidation's right to use the VP3 mine to facilitate its removal of coal "from . . . any other lands mined or leased by the said party or assigns" (including its other Buchanan mines), and notwithstanding that mining the VP3 mine is not "economically feasible," Levisa filed suit against Consolidation. The suit alleged that depositing mine

water in the VP3 mine was a trespass that would cause irreparable harm to Levisa. App. 9a; *see also* Virginia Supreme Court Record ("Va.Rec.") 1–27. Levisa sought a declaratory judgment that Consolidation "lacks the legal right to pump and store its Buchanan Mine water in the [VP3 mine]," Va.Rec. 6; App. 9a, and sought a preliminary injunction to stop Consolidation from depositing the mine water in the VP3 mine, App. 9a.

Consolidation filed a demurrer to the complaint in which it asserted its legal right to store mine water in the VP3 mine. *See* Va.Rec. 69–75; App. 9a–10a. Consolidation also argued that Levisa had no right to preliminary injunctive relief because, even if Levisa were being harmed by Consolidation's actions (which Consolidation disputed), any such harm was compensable by money damages and thus was not irreparable. App. 10a. Importantly, Consolidation also filed an answer asserting a number of affirmative defenses, including laches and ratification. App. 9a–10a; *see also* Va.Rec. 30–31.

After only preliminary discovery, the state trial court held a two-day hearing on the motion for a preliminary injunction. App. 10a. At the hearing, Levisa put forward a number of witnesses who testified concerning the relationship between Levisa, Island Creek and Consolidation, and the harm Levisa would suffer if the dumping of the mine water continued. App. 10a–13a. Levisa also introduced a number of exhibits, including the 1956 Lease and the 1937 Deed. Importantly, however, Levisa did *not* introduce the Pobst/Combs Deed or the 1908 Deed, presumably because these documents were not helpful to its case.

At the close of Levisa's evidentiary presentation, Consolidation moved to strike the evidence. App. 14a; *see also* Va.Rec. 623–626. Consolidation rested its motion solely on the argument that Levisa failed to establish that it would suffer any irreparable harm absent a preliminary injunction. *See* Va.Rec. 624 ("Their case fails, and I will just deal with one narrow point of it, with respect to irreparable harm."); *see also id.* (describing irreparable harm as "the threshold issue"). Consolidation argued both that Levisa had failed to show harm because any alleged damages were too speculative, *id.* at 625, and that any harm it did suffer would not be irreparable because "[t]here is clearly an adequate remedy at law," *id.*

Consolidation made no other arguments at the hearing. Indeed, Consolidation specifically declined to address the legal question whether Consolidation had the right to store water in the mine, reserving that for "[w]hen we have a chance to prove our case," *id.* at 658. Consolidation concluded: "[F]or right now, there has been no showing of irreparable harm. That is the threshold, the first requirement. For that reason . . ., the motion should be denied." *Id.* at 658–59.

The trial court agreed and granted Consolidation's motion to strike the evidence. App. 30a–31a. The court based this ruling on its finding that Levisa had failed to show irreparable harm. App. 32a–38a. The court questioned whether Levisa would suffer any damages, given that "it may never be economically feasible" to mine the VP3 mine, App. 34a, but held that, in any event, Levisa "has an adequate remedy at law" for any potential damages,

App. 36a. The court also noted that the harm to Consolidation from an injunction would be "astronomical." App. 36a. The court concluded: "But primarily I think the plaintiff has been clearly unable to establish the irreparable harm element" that would allow injunctive relief. App. 37a.

Only after issuing this holding did the court offer "[a] comment or two about the lease agreement." App. 37a. The court stated that it "would adjudicate [the] issue" whether Consolidation "has the right to place any kind of storage water in the VP3 mine" in favor of Consolidation. App. 38a. The court subsequently entered a final order memorializing this oral ruling and dismissing the case on the merits. App. 30a–31a.

Levisa sought review in the Virginia Supreme Court, which reversed. App. 2a–29a. The Virginia Supreme Court did not, however, base its ruling on any error in the trial court's holding concerning irreparable harm. Instead, the court reached out and decided, on an incomplete record, a central question on the merits of the case—namely, whether Consolidation had the "right to use any portion of the mineral estate to support mining operations on other lands." App. 22a. In addressing that issue, the court considered *only* the 1956 Lease and the 1937 Deed. *See, e.g.*, App. 22a. It did *not* consider the Pobst/Combs Deed or the 1908 Deed, because those deeds were not introduced into evidence in the truncated hearing on the preliminary injunction.

Nevertheless, the court ruled that it was definitively deciding the question of Consolidation's rights under the 1956 Lease.

> [B]ecause of the absence of any right of Consolidation Coal to store excess water from its mine in the VP3 Mine . . . the issue before the circuit court [on remand] will no longer involve the consideration of temporary injunctive relief but, rather, whether the circumstances warrant the issuance of a permanent injunction.

App. 25a.

In a timely petition for rehearing, Consolidation argued that the Virginia Supreme Court's ruling violated Consolidation's rights under the Due Process Clause of the Fourteenth Amendment because the court had decided a key issue in the case—the interpretation of the 1956 Lease—even though Consolidation had *never* been afforded an opportunity to present its evidence (which would have included the 1908 Deed and the Pobst/Combs Deed) or assert its affirmative defenses. The Virginia Supreme Court denied rehearing. App. 1a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Ruling Below Violates This Court's Precedent Under the Due Process Clause Because It Determined a Central Issue on the Merits Against Consolidation Before Consolidation Was Permitted To Present Its Case.

The Virginia Supreme Court's ruling directly contradicts this Court's settled precedent. In fact, this Court essentially decided the exact issue presented in this case nearly 100 years ago in *Saunders v. Shaw*, 244 U.S. 317 (1917). In *Saunders*, this Court held that a state court violates the Due Process Clause of the Fourteenth Amendment when it rules against a party without affording the party an opportunity to present evidence in its own defense. 244 U.S. at 319. Certiorari is thus warranted to ensure that settled precedent of this Court is followed.

The facts in *Saunders* mirror the facts here. As here, the case began in state trial court as a request for injunctive relief. *Id.* at 318. In both cases, upon the close of plaintiff's evidence, the trial court ruled against the plaintiff for failure to prove its case. In *Saunders*, the trial court ruled that plaintiff's key evidence was inadmissible. *Id.* Here, the trial court found that Levisa failed to prove irreparable harm and failed to prove that Consolidation's actions were improper under the 1956 Lease. App. 36a–37a. In both cases, the trial court then ended the injunction proceedings by entering final judgment for the defendants after hearing solely the plaintiff's evidence. 244 U.S. at 318–19; App. 30a–31a. The

defendants in both cases, then, had no opportunity or need to introduce evidence in the trial court.

Both cases were appealed. In *Saunders*, the Louisiana Supreme Court reversed based on an intervening decision in a different case. 244 U.S. at 319. In this case, the Virginia Supreme Court disagreed with the trial court's holding on the scope of rights under the 1956 Lease. App. 22a. The key point is that in both cases instead of remanding to allow the defendant to present evidence in the first instance, the state supreme court reversed the judgment and ruled against the defendant on the merits. In *Saunders*, the state court proceeded to enter an injunction. 244 U.S. at 319. Here, the state court ruled against Consolidation on a central issue in the case—the interpretation of the 1956 Lease—leaving to the trial court on remand only the question whether a permanent injunction was the appropriate remedy. App. 24a.

This Court unanimously reversed in *Saunders*, and it should reverse here. The Court in *Saunders*, per Justice Holmes, held that the Due Process Clause required a remand to allow the defendant to present its evidence. 244 U.S. at 319–20. Even though the newly issued state precedent could have rendered remand "an empty form," this Court nevertheless concluded that it could not "be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.* at 319.

This Court subsequently has found it necessary to re-affirm the same principle on several occasions—it violates due process for a court to rule on the merits of a claim against a party if that party has not had an opportunity to present its case. *See, e.g.*,

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930) (a Missouri state court deprived a party of due process because the party never "had an opportunity to defend" in the action); *Georgia Ry. & Elec. Co. v. City of Decatur*, 295 U.S. 165, 171 (1935) (holding that a court's refusal "to receive or consider" proof violates due process).

The Virginia Supreme Court's decision now makes it necessary for the Court to reaffirm that principle yet again. The decision below directly contradicts settled precedent. Indeed, this case arguably presents an even more egregious due process violation than *Saunders*. There can be no suggestion here that remand might be merely "an empty form." To the contrary, remand would allow Consolidation to introduce into evidence the 1908 Deed and the Pobst/Combs Deed, two essential documents in the chain of title that are vital for determining the parties' respective rights under the 1956 Lease. *Cf. Evans v. Indus. Accident Comm'n*, 162 P.2d 488, 489 (Cal. App. 1945) (holding, under *Saunders*, that the refusal to hear evidence on the "controlling issue" in the case violated due process). Indeed, these two documents conclusively establish Consolidation's right to store water in the VP3 mine.

The 1908 Deed conveyed to Prater Coal the right to use the Buchanan Parcels (which include the VP3 mine) "as may be necessary for removing the said coal or other minerals *from this and any other lands mined or leased* by the said party of the second part or assigns, and for other purposes incident to the operations herein contemplated." App. 51a–52a (emphasis added). The Pobst/Combs Deed conveyed to Pobst and Combs "all of the real estate" obtained

by Prater Coal in the 1908 Deed, "*together with all rights and easements* appurtenant o[r] incident thereto." App. 48a (emphasis added).

Pobst and Combs then specifically conveyed to Levisa all of the rights they had just obtained, including "all of the coal . . . together with *all rights, privileges and easements* appurtenant or incident thereto which were acquired [in the Pobst/Combs Deed]." App. 46a (emphasis added). The "rights" and "privileges" conveyed in the 1937 Deed thus included *all* of the rights that had been conveyed in the Pobst/Combs Deed and 1908 Deed, including the right to use the VP3 mine "as may be necessary for mining the said coal or other minerals *from this and any other lands mined or leased*." (emphasis added). This right was then passed on from Levisa to Island Creek (and then to Consolidation) through the 1956 Lease.

Because the Virginia Supreme Court did not have the 1908 Deed and the Pobst/Combs Deed, it could not see that the rights and privileges included in the 1937 Deed (and thus the 1956 Lease) included the right to use the VP3 Mine as necessary to mine other lands. The incomplete record led the court to reach the flatly mistaken conclusion that "the [1937] deed did not expressly convey to Levisa Coal the right to use any part of the estate . . . to support mining activities on other lands." App. 3a. As explained above, properly read in light of the 1908 Deed and the Pobst/Combs Deed, the 1937 Deed conveyed precisely that right.

Ironically, the court acknowledged that "the procedural posture of the case . . . resulted in an insufficient record for this Court to resolve the issue

of Levisa Coal's entitlement to injunctive relief." App. 23a. But the court failed to recognize that the same insufficient record made it impossible for the court to comply with due process requirements when it reached out to decide the critical issue it did reach—the interpretation of the 1956 Lease.

The important point here is not that allowing Consolidation an opportunity to introduce the 1908 Deed and the Pobst/Combs Deed will change the ultimate decision on the merits. Instead, the critical point is that this Court's precedent and the Due Process Clause require that Consolidation be allowed *the opportunity* to submit this evidence and have it considered by the state court before Consolidation's rights are finally determined. As this Court has stated:

> We are not now concerned with the rights of the plaintiff on the merits . . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 (1930). Consolidation was not afforded this opportunity, both because it never had an opportunity to present its evidence and because it was never given a chance to present or prove its affirmative defenses. *See Lindsey v. Norment*, 405 U.S. 56, 66 (1972) ("Due process requires . . . an opportunity to present every available defense.").

The state court's ruling thus directly contradicts this Court's holding in *Saunders*. This conflict is a compelling reason to grant the writ. *See, e.g., Kirk v.*

Louisiana, 536 U.S. 635, 635–36 (2002) (granting certiorari and reversing because "[t]he [Louisiana] court's reasoning plainly violates our holding in *Payton v. New York*, 445 U.S. 573, 590 (1980)); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 14 (1974) (granting certiorari "to decide whether the holding of the Florida Supreme Court was consistent with decisions of this Court"). If the Court does not exercise the writ when lower courts act in such direct contravention of its precedents, the Court's constitutional rulings would have little impact on how the law is actually applied.

Finally, there can be no doubt that the due process issue raised here is properly before the Court. Just as in *Saunders*, the due process question did not arise until the state supreme court issued its opinion deciding an issue against the party that had been given no opportunity to present evidence in the trial court. 244 U.S. at 320. Consolidation raised this issue at its first opportunity—its petition for rehearing in the Virginia Supreme Court—which preserved the issue for review by this Court. *Id.*; *see also Herndon v. Georgia*, 295 U.S. 441, 444 (1935) ("There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it.").

At stake in this case is the vital principle that, "while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law." *Brinkerhoff-Faris*, 281 U.S. at 682. By ruling that Consolidation had no right to store water in the VP3 mine before Consolidation had *any*

opportunity to present its defense and introduce key documents into evidence, the Virginia Supreme Court contradicted this Court's long-settled precedent and violated Consolidation's core due process rights. Certiorari is warranted to enforce the settled rulings of this Court and to allow Consolidation to return to state court and be given a chance in the first instance to prove its case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 18th day of September, 2008.

Levisa Coal Company,

Appellant,

against

Record No. 070580
Circuit Court No. CL 06-408

Consolidation Coal Company, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 6th day of June, 2008 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court.*

Deputy Clerk

Present: All the Justices

LEVISA COAL COMPANY

v. Record No. 070580

CONSOLIDATION COAL COMPANY

FROM THE CIRCUIT COURT OF BUCHANAN COUNTY
Keary R. Williams, Judge

OPINION BY
JUSTICE LAWRENCE L. KOONTZ, JR.
June 6, 2008

This appeal arises from a dispute between the owner of a solid mineral estate subject to a long-term mining lease and a third party. The dispute involves the storage of wastewater from the third party's mining operations on other lands in a particular mine located within the subject leasehold but with the lessee's permission. The owner of the solid mineral estate sought an injunction and declaratory judgment to prevent the third party from using the mine, which had been idled by the lessee, as a wastewater storage pit. We consider whether the circuit court erred in adjudicating that the third party "has a right to store excess water" from its mine in the mine in question and in denying the requested injunctive relief.

BACKGROUND

In 1937, Levisa Coal Corporation, the predecessor in interest to Levisa Coal Company, the plaintiff-appellant herein, acquired by severance deed the solid mineral estate and timber rights on various parcels of land in Buchanan County ("the Buchanan County parcels").[1] The severance deed conveyed to Levisa Coal ownership of "the coal, metals and timber, together with all the rights, privileges and easements incident thereto, in, on or under" the lands described in the deed. However, the severance deed did not expressly convey to Levisa Coal the right to use any part of the estate conveyed or the attendant easements to support mining activities on other lands. By a separate and subsequent severance deed, the rights to the oil and gaseous mineral estates of the Buchanan County parcels were conveyed to another party. Levisa Coal later acquired an interest in these estates through an oil, gas and coalbed methane lease.

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[1] Because, for purposes of this appeal, there is no significant distinction between these two entities, we will refer to the owner of the solid mineral estate as "Levisa Coal" without distinction as to whether the reference is to the current owner or its predecessor in interest.

In 1956, Levisa Coal entered into a lease with Island Creek Coal Company (Island Creek Coal) granting that company "the sole and exclusive right and privilege of mining and removing all of the coal from all the seams underlying the Tiller [V]ein or seam of coal or the horizon of such seam" in and upon the Buchanan County parcels conveyed by the 1937 deed.[2] The 1956 lease further provided Island Creek Coal with the right "generally, to make any use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations." Among the specific uses permitted was the right to "dump water or refuse on said premises." These rights, however, were "limited to such rights as [Levisa Coal] owns and has the right to lease," and the lease did not expressly purport to convey any right to use the leasehold for the support of mining operations on other lands.

Under the 1956 lease, Levisa Coal retained certain rights to the ownership and continued use of its solid mineral estate below the Tiller Vein and to easements serving Island Creek Coal's leasehold. As

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[2] The "Tiller Vein" refers to a particular deep-lying coal seam that has been identified by that name in geological surveys of western Virginia for at least the last ninety years. See, e.g., H. Hinds, The Geology and Coal Resources of Buchanan County, Virginia, Bulletin XVIII (VA Geol. Survey 1918).

relevant to this appeal, Levisa Coal retained "[t]he entire ownership and control of all the leased premises, and the coal . . . and other minerals and products therein and thereon, for all purposes (except those hereinbefore expressly set forth as leased to [Island Creek Coal])." Additional express rights reserved to Levisa Coal included "the right and privilege of draining water . . . over, across, or through the leased premises," as well as "the right and privilege of searching for oil, gas, or any other minerals or products and removing same when and wherever found." In furtherance of these rights, the lease provided that Levisa Coal could make excavations and bore "slopes, shafts, drifts, tunnels, and wells" so long as these operations did not interfere with Island Creek Coal's right under the 1956 lease to remove coal from below the Tiller Vein. Levisa Coal also retained a right of inspection within Island Creek Coal's works and mines to assure compliance with an agreed upon mining plan and calculation of royalties due under the lease and "to use freely the means of access to the said works and mines without hindrance or molestation" consistent with its rights under the 1937 deed.

The initial term of the 1956 lease was for five years with the lease automatically renewing for successive terms of twenty years so long as Island Creek Coal fulfilled its obligation to mine coal on the property and pay royalties to Levisa Coal, or in lieu thereof to make minimum payments to Levisa Coal for the lost opportunity if coal was not being mined.

At issue in this appeal is a mine designated by Island Creek Coal as the "VP3 Mine," which was opened on land subject to the 1956 lease in 1968. Although Island Creek Coal suspended its mining operations at the VP3 Mine in 1998, Levisa Coal does not contend that Island Creek Coal has failed to pay royalties or fulfill its other obligations under the lease and, thus, under its terms the lease remains in force until at least 2021. Moreover, Levisa Coal, through its managing general partner John C. Irvin, conceded during the proceedings of this case that it is not presently economically feasible to resume coal mining operations at the VP3 Mine.

In 1993, CONSOL, Inc. (CONSOL), a subsidiary of CONSOL Energy, Inc., acquired Island Creek Coal and all of its assets, including the rights and obligations of the 1956 lease. CONSOL has maintained Island Creek Coal as a separate corporate entity, although Island Creek Coal no longer has any active mining operations or employees and its corporate officers are also officers or employees of CONSOL or its subsidiaries. CONSOL is also the parent company of Consolidation Coal Company (Consolidation Coal), the defendant-appellee herein. Consolidation Coal maintains a coal mining operation, designated as the "Buchanan Mine" or "Buchanan No. 1 Mine" in the vicinity of Island Creek Coal's VP3 Mine as well as other idled mines once operated by Island Creek Coal.

Excess ground water naturally flowing into any deep mine as a result of mining operations hampers extraction of coal. Mine operators routinely remove such excess water or wastewater on a daily basis. The removal of excess water in the Buchanan Mine, as well as the excess water in the VP3 Mine, was initially accomplished by pumping that water directly into the nearby Levisa River or one of its tributaries. At some point after the acquisition of Island Creek Coal by CONSOL, it became necessary for Consolidation Coal to devise an alternate drainage system for the removal of excess water naturally flowing into its Buchanan Mine and the additional water released into that mine as a result of its continuing mining operations there. In general terms, the drainage system devised by Consolidation Coal involved pumping the excess water from the Buchanan Mine into a series of nearby idled mines once operated by Island Creek Coal which functioned as storage pits for the water until the water could be pumped into the Levisa River. Ultimately, this drainage system was designed to include the idled VP3 Mine. The rate of discharge of the wastewater into the river was to be limited from time to time so that the Levisa River could accommodate the increased water flow resulting from this discharge.

Ultimately, the chloride content of the anticipated discharged water into the Levisa River became an issue to be resolved in order for Consolidation Coal to comply with certain water standards established by the State Water Control

Board and to obtain the necessary permits to allow it to continue to pump mine water into the Levisa River. Consolidation Coal applied to the Virginia Department of Mines, Minerals, and Energy (DMME) for permits to discharge wastewater from the Buchanan Mine into idled mines under Island Creek Coal's control, including the VP3 Mine, and ultimately into the Levisa River in accord with its designed drainage system.[3] Subsequently, Consolidation Coal began discharging wastewater into the "Beatrice" and "VP1" mines and, when these mines could not accommodate additional water, the discharge was diverted to the VP3 Mine. The present rate of wastewater discharge from the Buchanan Mine into the VP3 Mine is nearly 2,500 gallons per minute. The VP3 Mine has a capacity to hold approximately 6.4 billion gallons of wastewater.

On July 10, 2006, Levisa Coal filed a complaint for injunctive relief and declaratory judgment against Consolidation Coal in the Circuit Court of Buchanan County seeking to prohibit Consolidation Coal from continuing to divert wastewater from the

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[3] According to statements in the record, Levisa Coal, by separate litigation, challenged the issuing of a permit by DMME to allow discharge of water into the VP3 Mine. The record does not disclose the current status or result of that litigation.

Buchanan Mine to the VP3 Mine. In seeking temporary and permanent injunctive relief, Levisa Coal maintained that "[t]he proposed pumping and storage of Buchanan Mine water in Levisa [Coal]'s properties will cause irreparable harm to Levisa [Coal]'s property and business interests." Specifically, Levisa Coal maintained that storing water in the VP3 Mine would result in absorption of coal bed methane gas and, with regard to the remaining coal in the property, would "vastly increase the costs that will be required in order to safely access and mine the coal in the future, effectively making it unminable." Levisa Coal further maintained that it had no adequate remedy at law to redress these alleged injuries.

Levisa Coal premised its action for declaratory judgment on the assertion that Consolidation Coal "lacks the legal right to pump and store its Buchanan Mine water in the [VP3 Mine]." It sought a declaration that Consolidation Coal "has no right to utilize Levisa [Coal]'s subject properties for temporary or permanent storage of Buchanan Mine water, and for judgment adjudicating all other issues expressly or inferentially raised."

On August 4, 2006, Consolidation Coal filed an omnibus response to the complaint, supported by an accompanying memorandum of law, asserting a demurrer, special plea in bar, answer and affirmative defenses. As relevant to this appeal, Consolidation Coal maintained that it had a legal right to discharge wastewater into the VP3 Mine

because Island Creek Coal, consistent with its purported rights under the 1956 lease, had agreed to permit Consolidation Coal to discharge the water into the VP3 mine. Consolidation Coal further maintained that Levisa Coal was not entitled to seek an injunction as it was not suffering any harm from the discharge of water into Island Creek Coal's leasehold, or, in the alternative, even if Levisa Coal were being injured by that action, it had an adequate remedy at law in the form of seeking monetary damages now or in the future.

The parties engaged in a lengthy period of discovery before Levisa Coal sought a hearing to request entry of a preliminary injunction. The circuit court conducted an ore tenus hearing on the request for a preliminary injunction on November 15 and 16, 2006. At that hearing, Levisa Coal took the position that, despite any agreement between Consolidation Coal and Island Creek Coal by which Island Creek Coal would purportedly accept responsibility for the dumping of water into the VP3 Mine, "it is Consolidation Coal Company that is doing it." Levisa Coal maintained that the 1956 Lease provided Island Creek Coal with the right to mine coal, but provided no right for Island Creek Coal to permit Consolidation Coal to put water into the mine.

In response, Consolidation Coal took the position that it was Island Creek Coal, not Consolidation Coal, that was actually putting water into the VP3 Mine and that Island Creek Coal was doing so in a

manner consistent with its rights under the 1956 lease. Consolidation Coal noted that even prior to the acquisition of Island Creek Coal by CONSOL, the two companies had cooperated in their respective mining efforts in the region. Consolidation Coal maintained that both companies had benefited from, and continued to benefit from, arrangements whereby mining operations on the lands and leaseholds of one were supported by activities on the lands and leaseholds of the other. In this context, Consolidation Coal asserted that Island Creek Coal's storage of the Buchanan Mine water in the VP3 Mine was a "use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations" as contemplated by the 1956 lease.

Consolidation Coal further contended that even if it, and not Island Creek Coal, were deemed to be the party responsible for the inundation of the VP3 Mine, it was doing so only within the voids, tunnels and shafts created in Island Creek Coal's leasehold below the Tiller Vein and, thus, in an area over which Levisa Coal had no current possessory interest. Thus, Consolidation Coal contended that Levisa Coal did not have standing to seek any relief against Consolidation Coal. Moreover, assuming that Levisa Coal had such standing, to the extent that it might suffer some damage to its interest in the gaseous mineral estate, which Consolidation Coal did not concede, Consolidation Coal maintained that such damage was a quantifiable harm for which

Levisa Coal could seek a monetary award at law. As to any other damages Levisa Coal might suffer as a result of impairment of its retained rights under the 1956 lease, Consolidation Coal maintained that these damages were "speculative" because the VP3 Mine was currently idle and there was no prospect of it being reopened for coal production or any other purpose. Thus, Consolidation Coal maintained that Levisa Coal could not establish irreparable harm for which injunctive relief should be granted.

Levisa Coal introduced evidence through testimony from Irvin, from Gerald Ramsey, a former employee of Island Creek Coal now employed by CONSOL Energy, from Andrew Cecil, a mining engineer, and from Charles Earl Ellis, a former employee of Island Creek Coal now working as an independent consultant who was qualified as an expert on business operations in the mining industry. We need not recount the substance of this testimony in detail, it being sufficient to say that Irvin, Ramsey and Ellis confirmed the history of the VP3 Mine and the relationship between Island Creek Coal and Consolidation Coal as related above. Additionally, Irvin testified concerning Levisa Coal's interest in the production of coal bed methane gas on the Buchanan County parcels.

Cecil's testimony provided support for Levisa Coal's contention that inundation of the voids, tunnels and shafts in the VP3 Mine would significantly impair the coal reserves of Levisa Coal in that portion of its estate and the adjoining strata.

Cecil opined, for example, that water in the VP3 Mine would be absorbed into the sandstone and shale layers above and below the coal seam, creating "issues" for the stability of the roof and floor of the mine, affecting the use of the mine tunnels and shafts for future access to the coal reserves in the strata below the Tiller Vein as well as increasing the cost of mining those reserves.

Levisa Coal also sought to introduce evidence of the potential damage to the gaseous mineral estate of the Buchanan County parcels in the form of an affidavit prepared by Timothy L. Hower. Levisa Coal contended that Hower was unavailable to testify in person because he was outside the United States on other business. Levisa Coal averred that it had attempted to make Hower available for cross-examination by deposition or by having the hearing conducted on a date when he would have been available, but contended that Consolidation Coal had "refused" to take Hower's deposition and implied that other difficulties with the discovery process had delayed the hearing until Hower was unavailable. Consolidation Coal responded that its objection was not merely that Hower was unavailable for cross-examination, but because the substance of his opinion as outlined in the affidavit was "speculative." The circuit court indicated that it would not "rul[e] on the substance of the affidavit," but that it would nonetheless exclude it from evidence because "it is patently unfair to allow this witness to testify by

affidavit without giving defendant's counsel the opportunity to cross examine."

Following the circuit court's ruling excluding Hower's affidavit, Levisa Coal rested its case in chief. Consolidation Coal then moved to strike Levisa Coal's evidence, contending that Levisa Coal had failed to establish that it would suffer any irreparable harm if the temporary injunction were not granted. This was so, Consolidation Coal maintained, both because the injury from the alleged trespass was merely speculative and, if actual, could be redressed by monetary damages awarded at law.

In addressing the motion to strike Levisa Coal's evidence, the circuit court stated that in its view the principal claim made by Levisa Coal with respect to the harm it would suffer from the inundation of the VP3 Mine was to "its coal and gas estate, although it is contested that it has a gas estate . . . there is some evidence here where the Court may conclude as much." The court concluded, however, that any damages to Levisa Coal's interests were quantifiable and, thus, it "has an adequate remedy at law if it in any way lost its coal estate, . . . gas or coal bed methane estate." The court further concluded that granting the preliminary injunction could result in "astronomical" harm to Consolidation Coal in that it possibly would be required to suspend operations at the Buchanan Mine. Accordingly, the court ruled that Levisa Coal had not met its evidentiary burden for obtaining a preliminary injunction.

The circuit court then ruled that the provision in the 1956 lease that granted to Island Creek Coal "use of the leased premises which lessee may deem needful or convenient in carrying out its mining operations or other operations" was "about as broad and expansive as we might imagine." Applying that interpretation of the lease, the court ruled that with respect to the declaratory judgment Consolidation Coal "has the right to place any kind of storage water in the [VP3] [M]ine." Accordingly, the court indicated that it did not need to hear evidence from Consolidation Coal's witnesses and directed counsel for Consolidation Coal to draft an order reflecting the court's rulings.

On December 13, 2006, counsel for Consolidation Coal submitted a draft order adopting by reference the circuit court's summation at the conclusion of the hearing and, in addressing the court's ruling on the declaratory judgment issue, reflecting that Levisa Coal had "requested in this hearing that the Court construe the November 16, 1956 Lease, and the rights imparted therein." On December 20, 2006, counsel for Levisa Coal submitted a lengthy set of written objections to the court's anticipated rulings as reflected in the court's summation and the draft order.

On December 22, 2006, the circuit court entered a separate order, which simplified the language of the draft order submitted by Consolidation Coal, but in substance reflected the court's rulings on Levisa Coal's requests for a preliminary injunction and

declaratory relief. On the latter issue, the court expressly ruled that Consolidation Coal "has the right to store excess water from the Buchanan No. 1 [Mine] in the VP3 Mine." Although the draft order had not done so, the court's order further provided that it was a final order "resolving all issues between the parties." Pursuant to Rule 1:13, the order was entered without endorsement of counsel "with the understanding that all objections the Parties have stated in the record are hereby preserved" including Levisa Coal's written objections submitted on December 20, 2006. We awarded Levisa Coal this appeal.

DISCUSSION

Levisa Coal has asserted 12 assignments of error to a number of aspects of the circuit court's conduct of the hearing held in this case and its final judgment. However, given the procedural posture of this case, we are of opinion that we need not address all of these assignments of error. As we have previously noted, the hearing was noticed on Levisa Coal's request for a temporary injunction. The circuit court ruled on the merits of the request for a declaratory judgment and denied injunctive relief after sustaining Consolidation Coal's motion to strike the evidence at the conclusion of Levisa Coal's evidence in chief. Accordingly, the resolution of

Levisa Coal's appeal rests principally upon two issues.[4] First, we will consider whether the circuit

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[4] While the petition for appeal in this case was under review, Consolidation Coal filed a motion to dismiss the petition for appeal and a renewed motion to dismiss. In those motions, Consolidation Coal contends that because the ruling on the declaratory judgment had been made at Levisa Coal's request, as recited in the circuit court's order, and Levisa Coal had not then sought a reconsideration of that ruling, it is barred from seeking review of that ruling on appeal. At oral argument of this appeal, counsel for Consolidation Coal again asserted that by requesting the inclusion of the court's ruling in the order, Levisa Coal is barred from pursing an appeal on this point. We disagree.

It is entirely proper for a party to request that a court memorialize in an order a ruling made from the bench, even when that ruling is contrary to the party's interest. Levisa Coal noted its objection to the court's interpretation of the 1956 lease as permitting the storage of water from any source within the VP3 Mine in the written objections submitted to the court prior to the entry of the final order, and those objections were expressly preserved by reference in that order. Thus, it was not necessary for Levisa Coal to renew its objection by a motion for reconsideration or any other means after entry of the final order. See, e.g., Chawla v. BurgerBusters, Inc., 255 Va. 616, 621-23, 499 S.E.2d 829, 832-33 (1998) (error preserved by plaintiff's written motion and supporting oral argument when objection noted on circuit court's final order). Accordingly, to the extent we have not already disposed of the matter by granting the petition for appeal, Consolidation Coal's motion to dismiss and renewed motion to dismiss are denied. Similarly, we find no merit to Consolidation Coal's contention made on brief of this appeal that Levisa Coal's written objections did not

court correctly construed the 1956 lease as providing Island Creek Coal, and, by extension, Consolidation Coal through Island Creek Coal's permission, with "the right to store excess water from the Buchanan No. 1 [Mine] in the VP3 Mine." Second, if the 1956 lease does not provide Island Creek Coal with the right to permit Consolidation Coal to store excess water from the Buchanan Mine in the VP3 Mine, we will consider whether the record supports the circuit court's denial of Levisa Coal's request for injunctive relief.

Interpretation of the 1956 Lease

Like all leases, a mining lease is a contract and "when the terms of a contract are clear and unambiguous, a court must give them their plain meaning." Pocahontas Mining L.L.C. v. Jewell Ridge Coal Corp., 263 Va. 169, 173, 556 S.E.2d 769, 771 (2002). On appeal, we review a trial court's interpretation of a lease under a de novo standard. See Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002) ("on appeal we are not bound by the trial court's interpretation of the contract provision at issue; rather, we have an equal opportunity to consider the

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satisfy the contemporaneous objection requirement of Rule 5:25.

words of the contract within the four corners of the instrument itself"); Wilson v. Holyfield, 227 Va. 184, 187-88, 313 S.E.2d 396, 398 (1984).

Levisa Coal contends that the circuit court misinterpreted the language of the lease allowing "any use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations" as permitting the support of mining operations on other lands. Levisa Coal initially notes that, under Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383, 105 S.E. 117 (1920), the 1937 deed conveying to it the solid mineral estate of the Buchanan County parcels permitted only a "necessary incidental easement" for purposes of removing the coal and other minerals. Id. at 390, 105 S.E. at 119. Thus, Levisa Coal maintains that it did not obtain the right under the 1937 deed to support mining operations on other lands by permitting the inundation of the subsurface area with wastewater. Accordingly, Island Creek Coal could not have obtained the right to do so within its leasehold because the 1956 lease expressly limited the easements Levisa Coal granted to Island Creek Coal "to such rights as [Levisa Coal] owns and has the right to lease." We agree with Levisa Coal.

In Clayborn, we were required to determine, as a matter of first impression in Virginia, whether a

trespass had occurred against the rights of the owner of the surface estate[5] where the owner of the severed coal estate was transporting coal from adjacent mining operations on other lands through the tunnels and shafts beneath the surface estate. We recognized that under "[t]he prevailing if not wholly unbroken current of authority . . . a grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a corporeal freehold estate in the coal, including the shell or containing chamber, and that as such owner he has the absolute right, until all of the coal has been exhausted, to use the passages opened for its removal for any and all purposes whatsoever, including in particular the transportation of coal from adjacent lands, so long as he operates and uses the passages with due regard to the rights of the surface owner." 128 Va. at 388, 105 S.E. at 118.

After extensively reviewing the law from other jurisdictions, we held that a deed or lease

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[5] "Surface estate" is a term intended generally to refer to the rights of the owner of that portion of the original tract of land that has not been severed by deeds granting rights in the mineral estate or other resources of the tract of land. As Clayborn made clear, the rights of the surface owner are not limited to control of the surface area, but, depending on what rights are retained, may extend into the subsurface area. Clayborn, 128 Va. at 388, 105 S.E. at 118.

transferring a coal estate or portion thereof is "the grant of an estate determinable [and w]hen the coal is all removed the estate ends for the plain reason that the subject of it has been carried away." Id. at 393, 105 S.E. at 120. Thus, "[t]he space [the coal] occupied reverts to the grantor by operation of law." Id. Accordingly, we concluded that the right to use the tunnels and shafts extended only to the mining operations within the determinable estate, and not to the support of mining operations on other lands. We further held that "[i]f the coal owner expects more" than the right to mine and remove the coal within his estate "he ought to stipulate for it" in the deed or lease. Id. a t 397, 105 S.E. at 122.

Although our decision in Clayborn was not consistent with the majority view of other jurisdictions , see id. at 401-02, 105 S.E. at 123 (Prentis, J, dissenting), with respect to the issue in this case that decision is in line with the long established view in American law that "[t]he owner of a mine . . . may allow the water therein to flow in natural channels and percolations into an adjoining mine, but he may not, in absence of an easement or license to do so, discharge [water] by means of artificial drains into such adjoining mine." Daniel M. Barringer and John S. Adams, The Law of Mines and Mining in the United States 631 (1900). This principle applies both to mines at different levels within the same subsurface area of a single tract of land as well as to mines on different tracts of land.

We can discern no practical distinction between supporting adjoining mining operations by using tunnels and shafts to transport coal, as in Clayborn, and the storing of wastewater from such operations in the voids, tunnels and shafts of an unrelated mine, as in this case. Accordingly, we are of opinion that when the 1937 deed conveyed the solid mineral estate of the Buchanan County parcels to Levisa Coal, the parties to that deed contemplated only that the coal and other minerals would be mined from that estate, and that the deed conveyed only an incidental easement to use that portion of the parcels retained by the surface owner as was necessary to support such mining operations. Nothing in the deed conveyed any right to use the voids, tunnels and shafts created below the surface for any purpose other than to support the mining operations on those parcels.

Since the 1937 deed conveyed no right to use any portion of the mineral estate to support mining operations on other lands, the 1956 lease could not have granted such right to Island Creek Coal. Accordingly, even if we were to accept Consolidation Coal's argument that there was an incidental benefit to Island Creek Coal's long-term operational plan for mining the Buchanan County parcels by permitting wastewater from the Buchanan Mine to be stored in the VP3 Mine, Island Creek Coal simply lacks the authority to permit Consolidation Coal to store wastewater from other mining operations in the VP3 Mine. Clearly, Island Creek Coal did not stipulate

for such a use of the leasehold in the 1956 lease, nor could Levisa Coal have granted such rights even if they had been sought. Thus, we hold that the circuit court erred in ruling that Consolidation Coal has a right to store wastewater from the Buchanan Mine in the VP3 Mine.

Denial of Levisa Coal's Request for Injunctive Relief

Because the circuit court premised its judgment to deny Levisa Coal's request for injunctive relief, at least in part, on its erroneous determination that Consolidation Coal had the right to store excess water from the Buchanan Mine in the VP3 Mine, we will reverse that judgment. Additionally, because the circuit court rendered that judgment in the procedural posture of the case which resulted in an insufficient record for this Court on appeal to resolve the issue of Levisa Coal's entitlement to injunctive relief, we will also remand the case for further consideration of that issue by the circuit court.

Upon appeal, Consolidation Coal has contended, as it did in the circuit court, that Levisa Coal lacks standing to seek injunctive relief in this case because the 1956 lease divested it of a present possessory interest in the leasehold given to Island Creek Coal. While the circuit court did not expressly address this contention, implicitly the court rejected it by reaching the merits of Levisa Coal's requested relief. The record sufficiently reflects that Levisa Coal's rights and interests are not limited to those of its retained ownership of the coal reserves below the

Tiller Vein that Island Creek Coal presently has a right to mine. In addition, Levisa Coal reserved the right to explore for and remove other minerals under the 1956 lease, and the circuit court found that there was sufficient evidence, even without Hower's affidavit, that inundation of the VP3 Mine with excess water from the Buchanan Mine would potentially damage the coal bed methane and other gas deposits associated with the VP3 Mine and adjoining strata in which Levisa Coal owns an interest. Accordingly, there is no merit to Consolidation Coal's contention that Levisa Coal lacks standing to seek injunctive relief in this case, and that contention will not be an issue upon remand of this case to the circuit court.

Levisa Coal's standing to seek injunctive relief in the present case, however, is not sufficient alone to establish an entitlement to such relief. Under well established principles, which will be applicable upon remand here, the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. See, e.g., Fancher v. Fagella, 274 Va. 549, 556, 650 S.E.2d 519, 522 (2007), Seventeen, Inc. v. Pilot Life Ins. Co., 215 Va. 74, 78, 205 S.E.2d 648, 653 (1974); Akers v. Mathieson Alkali Works, 151 Va. 1, 8, 144 S.E. 492, 494 (1928).

We also note that because of the absence of any right of Consolidation Coal to store excess water from its mine in the VP3 Mine and the evidence in

the record that it is currently doing so, the issue before the circuit court will no longer involve the consideration of temporary injunctive relief but, rather, whether the circumstances warrant the issuance of a permanent injunction.[6] In that regard, the circuit court may have the benefit of additional evidence on the issue of the damages that inundation of the VP3 Mine may cause to Levisa Coal's interests in the gaseous mineral estate associated with the VP3 Mine and the adjoining strata. Similarly, Consolidation Coal must be afforded the opportunity to present evidence to support its contention that Levisa Coal has an adequate remedy at law in the form of monetary damages resulting from the inundation of the VP3 Mine with wastewater from Consolidation Coal's mine.

The principles that a court must apply in properly exercising its discretion to grant or deny a permanent injunction have been identified in prior

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[6] In the circuit court Consolidation Coal urged the application of a four-factor approach for determining whether a preliminary injunction should issue, similar to that adopted by the United States Court of Appeals for the Fourth Circuit in Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 195-96 (4th Cir. 1977), for issues arising under F.R. Civ. P. 65. In the posture of this appeal it is not necessary to address that issue, and we express no view upon the matter.

decisions of this Court. "Under traditional equitable principles, a chancellor may enjoin a continuing trespass." Fancher, 274 Va. at 556, 650 S.E.2d at 522. See also Nishanian v. Sirohi, 243 Va. 337, 339, 414 S.E.2d 604, 606 (1992); Mobley v. Saponi Corporation, 215 Va. 643, 645, 212 S.E.2d 287, 289 (1975). However, even in a case involving a continuing trespass the guiding principle which remains constant is that the granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. See, e.g., Fancher, 274 Va. at 556, 650 S.E.2d at 522; Seventeen, Inc., 215 Va. at 78, 205 S.E.2d at 653; Akers, 151 Va. at 8, 144 S.E. at 494. Thus, in a case of a continuing trespass, such as the present case, we have stated that if "the loss entailed upon [the trespasser] would be excessively out of proportion to the injury suffered by [the owner], or a serious detriment to the public, a court of equity might very properly . . . deny the injunction and leave the parties to settle their differences in a court of law." Clayborn, 128 Va. at 399, 105 S.E. at 122.

We have also observed that unless a party is entitled to an injunction pursuant to a statute, a party must establish the "traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law" before a request for injunctive relief will be sustained. Virginia Beach S.P.C.A., Inc. v. South Hampton Rds. Veterinary Assoc., 229 Va. 349,

354, 329 S.E.2d 10, 13 (1985); see also Carbaugh v. Solem, 225 Va. 310, 315, 302 S.E.2d 33, 35 (1983). Clearly, if the plaintiff has no adequate remedy at law, equity will not countenance a continuing trespass merely because the trespasser, or even the public at large, will be benefited by allowing the trespass to continue. See Frank Shop, Inc. v. Crown Cent. Petroleum Corp., 264 Va. 1, 7, 564 S.E.2d 134, 137 (2002).

When an injunction is sought to enforce a contract right concerning personal property, the plaintiff has a high burden of showing that the failure to enjoin the alleged improper action will result in irreparable harm for which the law will afford him no adequate remedy. See, e.g., Griscom v. Childress, 183 Va. 42, 47, 31 S.E.2d 309, 312 (1944); Langford v. Taylor, 99 Va. 577, 580, 39 S.E. 223, 224 (1901). Unless the plaintiff can demonstrate that the property it seeks to protect has some personal value of sentiment or other intangible quality that cannot be restored to him at law, Langford, 99 Va. at 580, 39 S.E. at 224, or that monetary damages would otherwise not make him whole, the court will deny the injunction because the legal remedy is sufficient. Moore v. Steelman, 80 Va. 331, 339-40 (1885). Accordingly, in such cases, the court will give due weight to the adverse effect of the injunction being granted on the defendant.

By contrast, when the injunction is sought to enforce a real property right a continuing trespass may be enjoined "even though each individual act of

trespass is in itself trivial, or the damage is trifling, nominal or insubstantial, and despite the fact that no single trespass causes irreparable injury. The injury is deemed irreparable and the owner protected in the enjoyment of his property whether such be sentimental or pecuniary." Boerner v. McCallister, 197 Va. 169, 172, 89 S.E.2d 23, 25 (1955); accord Fancher, 274 Va. at 556, 650 S.E.2d at 522-23; Clayborn, 128 Va. at 398-99, 105 S.E. at 122.

Thus, in Clayborn we did not find that the alleged harm to the defendant constituted "the exceptional grounds" needed to require the owner of real property rights to forgo those rights for a purely legal remedy. Id. at 399, 105 S.E. at 122. Even though it was apparent from the record that the defendant could have negotiated the right to use the property "upon reasonable terms," we held that the court could not impose such terms on the parties and, thus, the injunction ought to have been granted. Id. at 400, 105 S.E. at 123.

Similarly, in Blue Ridge Poultry & Egg Co. v. Clark, 211 Va. 139, 176 S.E.2d 323 (1970), we rejected the claim that an injunction ought not to issue to protect a landowner from a noxious intrusion of effluent onto his land from a neighboring industrial farming operation. Despite the fact that the chancellor had found that the damages to Clark's property were quantifiable in terms of lost rent, we nonetheless held that "[t]he doctrine of 'balancing of equities' must be viewed in light of our long-standing pronouncement that a

private landowner is to be protected for injuries he may sustain 'even though inflicted by forces which constitute factors in our material development and growth.' " Id. at 144, 176 S.E.2d at 327 (quoting Townsend v. Norfolk Ry. & Light Co., 105 Va. 22, 49, 52 S.E. 970, 978 (1906)).

By contrast, in Akers we found that where the trespass had essentially stopped by the time the case had come to trial, granting an injunction "would be of little benefit to the complainant and would cost the defendant $1,000,000.00." Akers, 151 Va. at 8, 144 S.E. at 494. In such a case, the availability of a remedy at law was clearly appropriate, and thus an injunction was not appropriate. Id.; see also Mobley, 215 Va. at 646, 212 S.E.2d at 290.

Upon remand the circuit court will be guided by these principles after granting the parties the opportunity to present evidence regarding them.

CONCLUSION

For these reasons, we will reverse the judgment of the circuit court and remand the case for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded

VIRGINIA:

IN THE CIRCUIT COURT
OF BUCHANAN COUNTY

LEVISA COAL COMPANY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.
	)	CL 06-408
	)	
CONSOLIDATION COAL COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

This cause came to be heard on the 16th day of November, 2006, upon Plaintiff's Motion for Injunctive Relief. The Court received Plaintiff's evidence and argument in support of such motion and Defendant presented argument and moved to deny Plaintiff's Motion for Injunctive Relief upon the close of Plaintiff's evidence.

Pursuant to the findings of fact and conclusions of law as stated by the Court from the bench, as recited in the transcript, dated the 16th day of November, 2006, the Court DENIES Plaintiff's Motion for Injunctive Relief and GRANTS Defendant's Motion.

Further, Plaintiff's Motion to Add Party Plaintiffs was presented and opposed by Defendant. For reasons stated by the Court from the bench, that Motion is also DENIED.

Further, upon request by the Plaintiff, the Court has construed the November 16, 1956 Lease, and the rights imparted therein, and for the reasons stated from the bench and in the record, the Court has adjudicated by declaratory judgment that Defendant has the right to store excess water from the Buchanan No. 1 in the VP3 Mine.

Endorsement of this Order by all Counsel of Record in this proceeding is waived pursuant to Rule 1.13 of the Rules of the Supreme Court of Virginia, with the understanding that all objections the Parties have stated in the record are hereby preserved and that Plaintiff's additional written Objections are attached to this Order as Appendix A, which is incorporated herein by reference.

It is ORDERED that the clerk of this Court mail a copy of this Order to all Counsel of Record. The Court further Decrees that this is a Final Order in this matter, resolving all issues between the parties, and that this matter shall be removed from the Court's docket.

Entered this ORDER this 22nd day of December, 2006.

/s/ Keary R. Williams
JUDGE

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BUCHANAN

LEVISA COAL COMPANY, a Virginia Limited Partnership and L.L.P.,	:	
Plaintiff	:	Case No. CL06000408-00
–vs–	:	
CONSOLIDATION COAL COMPANY,	:	
Defendant	:	

November 16, 2006
9:00 a.m.

HEARD BEFORE:

THE HONORABLE KEARY R. WILLIAMS

* * *

THE COURT: No, I don't think that is proper. We could go backwards and forwards here all day. The Court has listened to the testimony and argument of counsel for one and two-thirds days now. I think we have probably postured this case to a point where the Court needs to direct its attention to the request and the motion that is before it, and that is the Motion to Strike after the plaintiff has rested.

I think it is important that, and I think counsel understands this, but any other person in this courtroom needs to understand that the Court has been requested to apply in the Virginia law an extraordinary remedy, an injunction, which is unusual, unique. And because of that fact and because of those circumstances, the Court has had, through the course of time, statutory case law and otherwise, some guidelines drawn for it in order to apply that extraordinary remedy.

And I think counsel for the defendant has adequately and correctly pointed out that primary in that regard is the fact that the burden is incumbent on the parties seeking that extraordinary remedy to establish the fact that there is irreparable harm occurring or about to occur if the Court doesn't apply the remedy.

Well, I have heard some impressive testimony from Charlie Ellis and Andy Cecil in particular

regarding that harm. The harm is that, if the Court fails to apply the remedy, the confluence of the water through this system that is contemplated that is not yet in place by Consol will bar and take away the interest of Levisa Coal Corporation in its coal and gas estate, although it is contested that it has a gas estate. I think there is some evidence here where the Court may conclude as much.

But the fact of the matter is no one has challenged in the course of these proceedings Island Creek's, Island Creek Consol's action in idling the mine in question as VP-3, concluding obviously that it is not economically feasible to mine the coal at present. As a matter of fact, it may never be economically feasible to mine the coal estate of Levisa Coal Corporation.

What I have seen through the years, and that is based on a life expanse for me living in this county, is that I have seen conditions worsen in the market and coal mines shut down and people walk away from those coal seams saying, never mine that coal seam. In ten years' time companies, individuals go back, because the market has improved and they mine those coal seams and they mine with different technology and different methods. I have seen that happen in certain coal seams two or three times where the operator/producer will conclude that it is no longer economically feasible to mine a seam, give up, and leave it, and go back and mine it.

It is not inconceivable to me as I sit here today and I listen to all the testimony, that the coal identified as the Levisa Coal at VP-3 won't someday be mined because of economic feasibility or because it is practical to mine that coal.

I don't know what the proper methodology is going to be to mine that, whether it is going to be possible to go back through the VP-3 shaft, pump the water out, rehabilitate the mine and enter the premises in that direction or whether there is a likelihood that a new shaft will be sunk in order to or a new shaft sunk in order to access the coal. But I clearly see from the barriers and mine maps that the coal will be in place and not damaged by water, whether it is groundwater flowing into the mine or water is placed there by Consol or Island Creek in this instance.

If, in fact, the defendant wrongfully cuts that coal off in some fashion and established that it was economically feasible to mine that or some action subsequent took place that barred Levisa from its coal estates, it is clear based on the testimony that I have heard in the last day-and-a-half, that it is with certain, with almost more than reasonable accuracy you can conclude the tonnage in place, the lease provides a method for determining the value, then I think Levisa can calculate its damages. It has an adequate remedy at law if it in any way lost its coal estate with regard to the gas or coal bed methane estate, and I think Levisa acquired that through a settlement agreement with Oxi USA.

That agreement may have preceded some other ruling this Court has made which may have more clearly made it identifiable based on a single case that the Court previously adjudicated as to ownership of the coal bed methane might be, but at any rate, by contract and settlement agreement Levisa acquired a right to some of the royalties of the gas estate.

But I have listened to that testimony very carefully, and John Irvin has told us that he receives these periodic payments for production for approximately two months previous, one of those is in evidence that shows certainly a super gob area extraction point within VP-3 and we can identify, I think from those statements historically what volumes are being produced at that mine.

We are going to know as water fills that cavity or the void as to whether there is any diminishment in the gas estate as a result of placing water in there or using the void as a storage area so that you can then calculate the loss by getting, based on the previous numbers, a high low, a mean figure, and then applying the royalty rates to the per volume numbers. So that again, Levisa has an adequate remedy at law if, in fact, it loses its gas royalties.

The Court additionally would have to consider what the harm is to the defendant if the Court were to grant the extraordinary remedy, the injunction. Based on the testimony that the Court has heard it could be astronomical. It could have the effect of

shutting down Buchanan #1 which affects the employees, which dramatically would affect the economy of this country, which would dramatically affect, I am sure, the economy of the operator, Island Creek and Consol.

But primarily I think the plaintiff has been clearly unable to establish the irreparable harm element so the Court can get to that remedy.

A comment or two about the lease agreement. It would appear to the Court that the plaintiff is asking the Court to construe Exhibit Number 2, Plaintiff's Exhibit Number 2 and the rights imparted therein, in a very restricted manner and say those rights granted to the lessee applied only to the surface. And I've read that and I have attempted to read it and digest it even as counsel covered that portion of the lease.

I can't get beyond the fact that the latter part of that, after it grants and specifies and enumerates the rights that are granted incident to the estate is granted, that the closing part of that paragraph says, "To make use of the leased premises which lessee may deem needful or convenient in carrying out its mining operations or other operations." To the Court that is about as broad and expansive as we might imagine.

I can't imagine that with that language in the lease it was the intent of the lessor or Levisa to restrict those rights only to some type of surface mining operation. I think if the lessor felt that way,

that some issue would have been raised previously by the exercise of the underlying estate when it began to extract coal from the Pokey 3 seam. That obviously has never happened.

The long and short of that is the Court would deny the temporary injunction. The Court is asked to adjudicate, I think by declaratory judgment action, whether the defendant has the right to place any kind of storage water in the VP-3 mine. I think I probably addressed that already. But in order to clarify that, I would adjudicate that issue certainly in favor of the defendant.

Now, I imagine having said that, the witnesses that have been hanging around for a day-and-a-half can probably pack up and go home.

MR. ALLEN: Your Honor, would you like for us to prepare the suggested order and circulate it to Mr. Street and --

THE COURT: Yes, I would ask counsel for the defendant, Buddy Allen, to compile an order that reflects the Court's ruling. And thank you.

THE HEARING WAS CONCLUDED.

THIS INDENTURE OF LEASE, made this 16th day of November, 1956, between LEVISA COAL CORPORATION, a corporation (hereinafter called the Lessor), party of the first part, and ISLAND CREEK COAL COMPANY, a corporation, chartered, organized, and existing under the laws of the State of Maine (hereinafter called the Lessee), party of the second part;

W I T N E S S E T H:

That in consideration of the sum of Nine Thousand, One Hundred Fifty-seven Dollars and Fifty Cents ($9,157.50) cash in hand paid by the said Lessee to the said Lessor, the receipt whereof is hereby acknowledged, and in further consideration of the agreement to perform and observe the terms, conditions, covenants, stipulations and agreement hereinafter set forth to be performed and observed by the Lessee, and reserving as rents the royalties and other payments hereinafter provided for, and subject to the exceptions and reservations hereinafter set forth, the Lessor hereby leases, lets, and demises unto the Lessee for the period of five (5) years from the date hereof, the sole and exclusive right and privilege of mining and removing all of the coal from all the seams of coal underlying the Tiller vein or seam of coal or the horizon of such seam, in and upon these certain tracts or parcels of land in Buchanan County, Virginia, which were conveyed to the Lessor by H. Claude Pobst and wife F. H. Combs and wife by deed dated December 28, 1937, recorded

in the office of the Clerk of the Circuit Court of Buchanan County, Virginia, on December 28, 1937, in Deed Book 76, page 585. Reference is made to said deed for a more particular description of the land hereby leased.

The above described land is herein sometimes referred to as "leased premises" or "demised premises."

There are expressly excepted and reserved from the land above described and the terms of this lease all rights, estates, easements, and privileges therein and thereon heretofore granted by the party of the first part and/or its predecessors in title prior to the date hereof, and this leases is made subject to the rights of all other parties under existing and extant leases and other writings, including, but no limited to, the deed of Lease dated July 25, 1952, recorded in said Clerk's Office in Deed Book 121, at page 444, between Levisa Coal Corporation and Vansant Coal Corporation.

Also, the right and privilege of making such coal into coke and other products of coal, and of preparing for market, transporting, shipping, and selling said coal and coke and other products of coal.

Together with such use, possession, and control of so much of the surface of the leased premises owned by the Lessor as may reasonable be convenient to Lessee in carrying out its operations hereunder, including, but not being limited to, the right to erect and maintain thereon any and all buildings,

structures, and improvements that Lessee may deem needful or convenient in carrying on its operations hereunder, and the right to carry on upon said premises such incidental enterprises as stores, theatres, filling stations, pool and billiard halls, hospitals, meeting halls, schools, churches, and other enterprises of a similar character; together with the right to make excavations on the demised premises and to use on such premises (but not off the premises) any stone, sand, water, or other materials found thereon that Lessor may own, and to dump water or refuse on said premises, and to store coal thereon; the right to go upon the leased premises for the purpose of prospecting for said coal by any and all desirable means, including (but not restricted to) the boring of diamond drill holes; and, generally, to make any use of the leased premises which Lessee may deem needful or convenient in carrying on its mining or other operations.

Also, the right and privilege, but subject, nevertheless, to the rights, if any, heretofore granted by Lessor to others therefore, of cutting and using, for the operations under this lease, but for no other purpose, the timber and trees standing and fallen on the premises herein specifically described not exceeding twelve inches (12") in diameter, bark included, and not under five inches (5") in diameter, bark included, measured one foot (1') from the ground.

This lease is expressly made subject to all oil and gas leases and easements for roads, electric power

lines, telephone and telegraph lines, pipe lines, and railroads outstanding as of the date hereof; but Lessee, to the extent of the estates and privileges hereby leased, shall be entitled to exercise, and is hereby granted by Lessor, the benefit and the right to exercise all rights, privileges and estates excepted or reserved to the Lessor or grantors in the instruments granting such leases or easements, or not granted to the lessees or grantees therein:

With respect to the tracts contained in the leased premises wherein Lessor claims only the coal or minerals, the rights herein leased and demised to Lessee shall, with respect to such tracts, be limited to such rights as Lessor owns and has the right to lease on the date hereof or as it may acquire thereafter.

* * *

IN WITNESS THEREOF, the parties hereto have caused this Indenture of Lease to be duly executed as of the day and year first above written:

LEVISA COAL CORPORATION,

By
F.H. Combs, President.

ATTEST:
H. Claude Pobst
Secretary

ISLAND CREEK COAL COMPANY

By
R.E. Salvati, President.

ATTEST:
C.A. Rouse
Assistant Secretary

VIRGINIA, BUCHANAN COUNTY, to-wit:

In the Clerk's Office of the County and State aforesaid, the 28th day of December, 1937, at 10:00 o'clock A.M., the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment recorded in Deed Book No. 76, page 584.

TESTE: A. H. GOFF, CLERK,

By /s/, DEPUTY CLERK

THIS DEED, made and entered into on this 28th day of December, 1937, by and between H. Claude Pobst and Mary Alice Pobst, his wife, F. H. Combs, and Harriet R. Combs, his wife, parties of the first part and LEVISA COAL CORPORATION, a corporation, chartered, organized and doing business under and by virtue of the laws of the State of Virginia, party of the second part.

WITNESSETH: THAT for and in consideration of the sum of Two Hundred Dollars ($200.00), cash in hand paid, the receipt of which is hereby acknowledged, the said parties of the first part hereby grant and convey unto the said Levisa Coal Corporation all the coal, metals and timber, together with all rights, privileges and easements incident thereto, in, on or under the following described parcels of land, all situate, lying and being in

Buchanan County, Virginia, (those of said parcels of land which are described as being situate on Dry Fork of Big Prater Creek and on Right Fork of Big Prater Creek, being waters of Levisa Fork of Sandy River, being situate in Grundy Magisterial District of said County, and those of said parcels which are described as being situate on Hurricane Creek, Russell Fork River, Little Fox Creek of Russell Fork River, Big Fox Creek of Russell Fork River and Indian Creek of Russell Fork River, lying and being in Hurricane Magisterial District of said County) which said parcels of land are located on the following creeks and rivers, and contain the following number of acres, to-wit:

* * *

The foregoing parcels of real estate were conveyed to the Harrah Coal Land Company by A. D. Harrah and wife by deed dated April 25, 1908, and recorded May 5, 1908, in the Office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 34, page 475, et seq. reference to which deed is here made for a more particular description of said parcels of real estate.

* * *

Reference is here made to the foregoing deed and the recordation thereof for a more particular description of the aforesaid parcels of real estate.

It is the intention of this deed to convey and the said parties of the first part hereby convey unto the

said party of the second part of all of the coal, metals and timber, together with all rights, privileges and easements appurtenant or incident thereto which were acquired by the said H. Claude Pobst and F. H. Combs by deed from Prater Coal Land Company, a corporation, dated December 4, 1937, and recorded December 8, 1937, in the office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 76, page 521.

The parties of the First part hereby covenant to and with the party of the second part that they will warrant specially the property hereby conveyed.

Witness the following signatures and seals.

	H. Claude Pobst	(SEAL)
	Mary Alice Pobst	(SEAL)
REVENUE		
STAMP $0.50	F. H. Combs	(SEAL)
	Harriette R. Combs	(SEAL)

THIS DEED made and entered into on this the 4th day of December, 1937, by and between PRATER COAL LAND COMPANY, a corporation chartered, organized and doing business under and pursuant to the laws of the State of West Virginia, party of the first part and H. CLAUDE POBST and F. H. COMBS, parties of the second part.

WITNESSETH:

That for and in consideration of the sum of Ten Dollars ($10.00) cash in hand paid, the receipt of which is hereby acknowledged, the said party of the first part hereby grants and conveys unto the said H. Claude Pobst and F. H. Combs all of the coal, oil and gas as well as all such other minerals, metal and timber as the party of the first part may own or be entitled to in or upon the lands hereinafter identified, together with all rights, privileges and easements in, on or under the following described parcels of land all situate, lying and being in Buchanan County, Virginia (those of said parcels of land which are described as being situate on Dry Fork of Big Prater Creek and on Right Fork of Big Prater Creek, being waters of Levisa Fork of Sandy River, being situate in Grundy Magisterial District of said county, and those of said parcels which are described as being situate on Hurricane Creek, Russell Fork River, Little Fox Creek of Russell Fork River, Big Fox Creek of Russell Fork River and Indian Creek of Russell Fork River, lying and being in Hurricane Magisterial District of said County)

which said parcels of land are located on the following creeks and rivers, and contain the following number of acres, to-wit:

* * *

The foregoing parcels of real estate are the same real estate conveyed to Harrah Coal Land Company by A. D. Harrah and wife, by deed dated April 25, 1908, and recorded May 5, 1908, in the office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 34, pages 475 et seq., reference to which deed is here made for a more particular description of said parcels of real estate.

* * *

Reference is here made to the foregoing deed and the recordation thereof for a more particular description of the aforesaid parcels of real estate.

It is the intention of the deed to convey and the said party of the first part does hereby convey unto the said parties of the second part all of the real estate, together with all rights and easements appurtenant on incident thereto, owned by said party of the first part in Buchanan County, Virginia, whether hereinbefore mentioned and described or not.

Prater Coal Land Company, grantor herein, is the same corporation heretofore known as Harrah Coal Land Company, to which the aforesaid parcels of real estate were conveyed, the name of said

Harrah Coal Land Company having been changed, as provided by law, to Prater Coal Land Company.

The party of the first part covenants that it is seized and possessed of the aforesaid property and property rights and that it has the right to grant and convey the same; that it warrants generally its title thereto, except as to taxes, it being expressly understood that the conveyance hereby made is without warranty, either express or implied, on the part of the grantor in respect to taxes or any lien or claim charged or chargeable for taxes against the aforesaid property or any part of the same.

IN WITNESS WHEREOF Prater Coal Land Company has caused its name to be signed hereto by its President, and its corporate seal to be hereto affixed, attested by its Secretary, on the day and year first above written.

PRATER COAL LAND COMPANY,

By L. Epperly,
President.

ATTEST:

H. D. Everett,
Secretary.

This Deed, made this 25th day of April 1908 between A.D. Harrah and M.A. Harrah, his wife, of the City of Charleston, County of Kanawha and State of West Virginia, parties of the first part, and the Harrah Coal Land Company, a corporation organized and doing business under the laws of the State of West Virginia, party of the second part.

Witnesseth:

That for and in consideration of Five Dollars ($5.00) cash in hand paid, the receipt whereof is hereby acknowledged and certain other valuable considerations hereinafter maintained, (a) the said parties of the first part do grant, bargain, sell and convey unto the said party of the second part with covenants of general warranty, all the real estate, rights, interests and privileges, as hereinafter set forth and described in, to, of and concerning all these certain tracts, parcels and boundaries of land (hereinafter called tracts,) situate, lying and being in the waters of Levisa Fork and Russell's Forks, tributaries of the Big Sandy River, in the county of Buchanan and State of Virginia, that is to say: (b)

* * *

Together with the right of ingress, egress and passage over, through and under the surface of the said several tracts of land, for the purposes of mining and removing all the coal, oil and gas from said tract, as from the other lands mined by the said party of the second part, or assigns, and the right to

remove all the coal and other minerals, oil and gas, with out leaving any support for the overlying strata and with out any liability or damage which may result from the breaking of said strata, and the right to manufacture coke or other products from said coal, oil or gas and the right to use so much of the surface land as may be necessary for coal yards, dumping yards or grounds on which may be dumped the waste from the mines: for the erection and location of tipple building and machinery for mining purposes and for the erection of coke ovens, washeries, coal crushing and other machinery necessary for purposes, and for the erection of houses for miners, commissaries and such other buildings as may be necessary: also the right to use the water and necessary stone thereon for any and all purposes herein contemplated, and to pump the water from the said mines onto said surface if necessary, and for that purpose to lay, from time to time such pipes as may be necessary, also the right to cut and use such timber on said land as may be necessary for the purposes herein contemplated as specified in respect to the above described tracts respectively, and other necessary mining rights over and under the surface of said tracts of land. Rights-of-way, also, are here granted to the said party of the second part, or assigns, for each road, railroad and tram-roads through, over and under the surface of said tract of land, as may be necessary for removing the said coal or other minerals, from this and any other lands mined or leased by the said party of the

second part or assigns, and for other purposes incident to the operations herein contemplated; as fully and to the same extent in all respects as such rights, privileges and immunities are vested in the said party of the first part under and by virtue of the said several conveyances.

It is expressly provided that if the operations herein contemplated shall at any time be abandoned by the party of the second part, or assigns, then all machinery, houses, railroad, tram-roads, and materials of what ever character placed on the said land may be removed therefrom.

The said rights and privileges hereby granted shall forever run with and be appurtenant to any and all the coal and other minerals, oil, gas and timber, or other products in and under the said lands herein described, and in, on and under any other lands now owned or hereafter acquired, and also all coal and minerals, oil, gas and timber rights now owned or hereafter acquired by the said party of the second part, or assigns, and all persons as corporations claiming by, through or under it.

The said parties of the first part covenant that they have the rights to convey the said coal and other minerals, oil and gas, and the rights herein granted to the grantee, that they have done no act to encumber the same, that the said party of the second part shall have quiet possession of said coal and other minerals, oil and gas, and the rights herein granted free from all encumbrances; and that the

said parties of the first part will execute such further assurances of the said rights as may be required.

For the residue of the considerations of this conveyance, the said Harrah Coal Land Company, party of the second part, has executed to the said A.D. Harrah, party of the first part, its two notes for $41,299.70 each, bearing date the 25th day of April, 1908, due and payable at one and two years respectively, with interest from date, to secure the payment of which a vendor's lien is hereby expressly retained and reserved upon the property hereby conveyed. To have and to hold unto the said party of the second part and its assigns forever.

Witness the following signatures and seals.

A. D. Harrah (Seal)
M. A. Harrah (Seal)

125 f4 No. 08-865

APR 22 2009

In The Supreme Court of the United States

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

LEVISA COAL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted to review part of a state court decision which features no issue of federal law and no constitutional question that was pressed and passed upon below, when that case turns on the interpretation of unambiguous documents under settled principles of state law and the alleged denial of due process arises solely because settled state law does not permit the introduction of extrinsic evidence concerning the interpretation of documents the parties agreed were unambiguous?

RULE 29.6 STATEMENT

Levisa Coal Company, A Virginia Limited Partnership and L.L.P., is not a publicly held corporation and does not have a parent or publicly held company owning 10% or more of the corporation's stock.

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BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Rules of the United States Supreme Court, Levisa Coal Company, A Virginia Limited Partnership and L.L.P. ("Levisa") files this Brief in Opposition to the Petition for Writ of Certiorari filed by Consolidation Coal Company ("Consolidation").

STATEMENT OF THE CASE

The Supreme Court of Virginia ruled that Consolidation had no legal right to dump its wastewater into another mine where Levisa's coal was located. The Court found that the 1956 Lease between Levisa and Island Creek Coal Company ("Island Creek") did not give that right even to Island Creek (who could not have given it to Consolidation). As secondary support for its finding, the Court also interpreted the 1937 Deed, holding that Consolidation had no right to dump foreign water from another mine operated by a completely separate entity, so it could not have agreed to grant others such a right even if it had wanted to.

Consolidation seeks to challenge this legal interpretation of the 1956 Lease, which it interjected into this case as the basis for its right to dump, by making a late claim that its constitutional due process rights have been violated by such a ruling. However, the record reveals that Consolidation represented below that the 1956 Lease was unambiguous and should be construed as a matter of law, only changing its position once the Supreme Court of Virginia rendered its opinion in this case.

Rather than raising any genuine due process issues, this case really relates to the legal interpretation of a single contract, the 1956 Lease, which was properly construed as a matter of law by the Supreme Court of Virginia under well-established state law.

Further, in accordance with Rule 15(2) of the Rules of the United States Supreme Court, Levisa will point to misstatements of fact in Consolidation's Petition for Writ of Certiorari ("Petition").

A. Background

This case concerns the unlawful dumping by Consolidation of billions of gallons of contaminated water into the "VP3 Mine" where Levisa owns substantial coal and has coalbed methane gas interests. (App. 2a, 6a-8a).[1] Levisa leased certain mining rights to Island Creek under the 1956 Lease, but it retained rights to the ownership and continued use of the coal and easements thereto. (App. 4a-5a). In 1993, Consolidation's parent company acquired Island Creek, which remains a separate corporate entity. (App. 6a). Although Consolidation does not own or even lease the right to mine the coal within and around the VP3 Mine, it has been unlawfully using that mine as a "storage pit" for disposal of its high chloride wastewater, which could not otherwise be legally dumped into the local river from its coal mining operations at the entirely separate "Buchanan Mine." (App. 2a, 7a-8a).

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[1] References to the Appendix contained in the Petition for Writ of Certiorari will be denoted "(App. __)."

Consolidation has been dumping this contaminated water into Levisa's coal mine at a rate of 2,500 gallons per minute. (App. 8a). The "inundation" of wastewater at the VP3 Mine has continued, with only limited interruption since 2006.

B. Procedural History

In 2006, Levisa filed a Complaint for Injunctive Relief and Declaratory Judgment against Consolidation in the Circuit Court for Buchanan County, Virginia ("circuit court"). (App. 8a). Levisa sought a declaration that Consolidation had no legal right to dump and store its Buchanan Mine water in the VP3 Mine, and temporary and permanent injunctive relief to prevent the continued dumping. (App. 8a-9a).

Consolidation filed responsive pleadings maintaining that it had the legal right to dump its chloride water into the VP3 Mine because Island Creek had those rights under the 1956 Lease and had agreed to allow Consolidation to dump into the VP3 Mine. (App. 9a-10a). Although Consolidation mentions in its Petition that it filed affirmative defenses, it does not claim that those defenses relate to the matter before this Court; rather, the new due process claim is based on unrelated matters never raised in the circuit court. (Pet. 8).[2]

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[2] References to the Petition for Writ of Certiorari will be denoted "(Pet. __)."

The Evidentiary Hearing

Following discovery,[3] the circuit court conducted a two-day evidentiary hearing on Levisa's request for entry of a preliminary injunction. (App. 10a). At that hearing, Consolidation claimed that the 1956 Lease answered the question whether Consolidation had the right to dump water into the VP3 mine. (J.A. 249-251, 255, 257-258).[4] Indeed, Consolidation even claimed that Levisa was ignoring the 1956 Lease, (J.A. 250, 283), and would "lose once the lease comes into play." (J.A. 284).

In its opening statement, Consolidation introduced the circuit court to what would be the legal linchpin of its case – the 1956 Lease and the 1937 Deed. (J.A. 249, 257-258). Consolidation described the two contracts as the "operative agreements" in the case. (J.A. 257).

Consolidation incorrectly states in its Petition that the *only* argument it asserted at the hearing was that Levisa could not establish that it would suffer any irreparable harm. (Pet. 9). It also incorrectly states that it "specifically declined to address the legal question whether Consolidation had the right to store water in the mine." (Pet. 9). Consolidation is wrong.

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[3] Consolidation states in its Petition that there was "only preliminary discovery." (Pet. 8). However, the Supreme Court of Virginia found that "[t]he parties engaged in a lengthy period of discovery." (App. 10a).

[4] References to the Joint Appendix filed in the Supreme Court of Virginia will be denoted "(J.A. __)."

At the hearing, Consolidation took a firm stance that the 1956 Lease and 1937 Deed were unambiguous, and invited the circuit court to interpret them without the aid of any additional evidence. Consolidation's counsel stated:

> Here the lease didn't say anything about preventing the lessee from storing water and granted in addition specific rights. In terms of contract interpretation I suggest to the Court that the [coal] lease and the other documents are clear and unambiguous and the Court can and should interpret the documents and I don't think extrinsic evidence is necessary or proper. And those leases are before you and can be taken by this plaintiff.

(J.A. 286).

Further, Consolidation objected to any evidence bearing on the interpretation of the 1956 Lease, "because that's [the court's] responsibility unless [Levisa's counsel] is going to say that this agreement is ambiguous and he wants to introduce extrinsic evidence." (J.A. 451). Consolidation also asserted that "it is for the Court and not for any particular witness to tippy-toe through the document and start interpreting it." (*Id.*) Levisa agreed with Consolidation that the lease was unambiguous. (J.A. 453). And the circuit court agreed that it would interpret the plain language of the lease without parol evidence: "The lease speaks for itself,

obviously. . . . I can't imagine that counsel is offering the witness and asking these questions to interpret the lease to the Court, the Court certainly is going to do that." (*Id.*)

In unequivocal terms, Consolidation told the circuit court that the documents "are controlling," "will speak for themselves," are "unambiguous," and contain "plain language." (J.A. 275, 283, 285, 286). Therefore, Consolidation not only identified the 1956 Lease and 1937 Deed as the controlling documents in the case, but also asked the circuit court to interpret them right then and there.

Consolidation pressed upon the circuit court the very interpretation of the 1956 Lease that it unsuccessfully argued to the Supreme Court of Virginia, and continues to urge now. (App. 11a; J.A. 249, 257-262, 283, 285-286, 652-657). In its argument to the circuit court, Consolidation declared that its rights under the 1956 Lease "are extremely broad." (J.A. 656). Under Consolidation's reading of this unambiguous document, "Island Creek Coal's storage of the Buchanan Mine water in the VP3 Mine was a 'use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations' as contemplated by the 1956 lease." (App. 11a; J.A. 285-286). Relying upon its interpretation of the 1956 Lease, Consolidation argued that Levisa did not have a valid underlying claim on the merits. (J.A. 283).

Although Consolidation introduced evidence at the hearing[5] and offered numerous arguments to the circuit court concerning its legal rights as well as the 1956 Lease and the 1937 Deed, it at no time even mentioned the Pobst/Combs Deed or the 1908 Deed that it now claims are vital to an interpretation of the "controlling documents" in this case. Consolidation argues in its Petition that "Levisa did *not* offer the Pobst/Combs Deed or the 1908 Deed, presumably because these documents were not helpful to its case (emphasis in the original)." (Pet. 8). Consolidation tries to shift the focus to Levisa rather than address the sweeping admissions it made below about the "unambiguous" and "plain" 1956 and 1937 documents which "speak for themselves." (J.A. 275, 283, 285, 286). In light of Consolidation's unequivocal argument that these unambiguous documents *alone* determined whether it had the legal right to dump, it hardly can ask why the two deeds which it never mentioned were not placed in the record.

Further, Consolidation incorrectly states in its Petition that "[i]nterpreting the 1956 Lease requires looking not only at the lease agreement itself, but also at other deeds and leases in the chain of title that are expressly referenced in the 1956 Lease." (Pet. 4). The 1956 Lease references the 1937 Deed, which was in evidence and actually considered by the courts below, but it does not reference the

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[5] Among the documents that Consolidation introduced as evidence below included an opinion of counsel asserting that Consolidation had the right to dump in the VP3 Mine under the 1956 Lease and a letter from its Senior Counsel (in-house) to Levisa making the same assertion. (J.A. 849-858).

Pobst/Combs Deed or the 1908 Deed. (App. 39a-43a; J.A. 669-688). The two documents which form the basis for this due process claim are not even mentioned in the 1956 Lease.

After Levisa rested its case, Consolidation moved to strike, and the circuit court sustained the motion, finding that Levisa was not entitled to a preliminary injunction. (App. 14a). The circuit court then resolved the declaratory judgment on the basis of the 1956 Lease – precisely as Consolidation had asked it to do. Applying a broad interpretation of Island Creek's rights under the lease, the circuit court ruled that Consolidation "'has the right to place any kind of storage water in the [VP3] [M]ine.'" (App. 15a).

The Circuit Court's Order

Without objection from Consolidation, the circuit court entered a final order on the injunction and declaratory judgment on December 22, 2006. With respect to its resolution of the declaratory judgment, the circuit court stated in plain terms that it "has construed the November 16, 1956 Lease, and the rights imparted therein" and "has adjudicated by declaratory judgment that Defendant has the right to store excess water from the Buchanan No. 1 in the VP3 Mine." (App. 31a). Again, the circuit court did exactly what Consolidation asked it to do.

Appeal to the Supreme Court of Virginia

Levisa appealed to the Supreme Court of Virginia, challenging both the circuit court's declaration that the 1956 Lease gave Consolidation the legal right to pump its water into the VP3 Mine and its denial of

injunctive relief. (J.A. 230). It asserted 12 distinct assignments of error. Even though Levisa's appeal placed the question of Consolidation's legal right to dump water into the VP3 Mine squarely before the Supreme Court of Virginia, Consolidation did not challenge the fact that the circuit court resolved the contract interpretation question as a matter of law without any parol evidence from Consolidation. Consolidation had already told the circuit court that its legal right to dump water in the VP3 Mine could be determined by interpreting the unambiguous 1956 Lease and 1937 Deed without any additional evidence. Thus, the circuit court did exactly what Consolidation invited it to do.

Consolidation never asserted any claim or argument that, in the event of reversal, it was entitled to introduce evidence on the declaratory judgment. In its brief in opposition to Levisa's petition for appeal, Consolidation failed to assign any cross-error, lodging no objection to the circuit court's interpretation of the 1956 Lease or its failure to consider evidence Consolidation might offer in support of that construction. Virginia attorneys are well-aware of the strict procedural requirements in the Supreme Court of Virginia which mandate that all error must be asserted when the appeal is presented to the court. Cf. Va. S. Ct. Rule 5:18 (the brief in opposition to a petition for appeal "may include assignments of cross-error and . . . no cross-error not then assigned will be noticed by this Court.") If Consolidation opposed interpretation of the 1956 Lease or the 1937 Deed as a matter of law without parol evidence, its opportunity to complain was provided below.

The Supreme Court of Virginia awarded Levisa an appeal on each one of its 12 assignments of error. (App. 16a).

The Supreme Court of Virginia's Rulings

Consolidation aggressively sought to prevent the Supreme Court of Virginia from reaching the merits of Levisa's appeal, filing two motions to dismiss and asserting various waiver arguments. (App. 17a-18a). The Supreme Court of Virginia denied both motions to dismiss, neither of which asserted any due process claim, and rejected the waiver arguments. (App. 17s-18a).

After receiving briefs and argument from the parties, the Supreme Court of Virginia issued a unanimous opinion reversing the judgment of the circuit court. (App. 2a-29a). It held that the circuit court incorrectly interpreted the 1956 Lease, and remanded the case for "further proceedings," including an evidentiary hearing on Levisa's request for a permanent injunction. (App. 25a, 29a).

The Supreme Court based its reversal of the circuit court's declaratory judgment on two grounds. First, the Court held that the plain language of the 1956 Lease simply does not permit the dumping of water from another mine. (App. 19a). Thus, it interpreted the 1956 Lease as a matter of law, rejecting Consolidation's broad reading of the document. Second, the Court held that the 1937 Deed of coal to Levisa "conveyed no right" to dump water from foreign properties and, therefore, because Levisa

never acquired that right, it could not have given such a right to anyone else. (App. 22a-23a). Thus, the Court interpreted the 1937 Deed and the 1956 Lease as a matter of law, as Consolidation had requested.

With regard to the injunction, the Supreme Court noted that the circuit court had "premised" its denial of Levisa's request for injunctive relief, "at least in part, on its erroneous determination" of Consolidation's right to store the wastewater. (App. 23a). Accordingly, without reaching the other assignments of error asserted by Levisa, the Supreme Court reversed the denial of injunctive relief, and remanded the case "for further consideration of that issue by the circuit court." (*Id.*) Because Consolidation "is currently" dumping water from its mine into the VP3 Mine, the Court held that the question on remand is whether Levisa is entitled to a permanent, but not a preliminary, injunction.[6] (App. 24a-25a). It further noted that Consolidation "must be afforded the opportunity to present evidence" on the question whether Levisa has an adequate remedy at law. (App. 25a).

Post-Opinion Motions in the Supreme Court of Virginia

Consolidation filed a petition for rehearing raising three arguments, all of which it asserted for the first time: (1) that the Supreme Court erred by ruling

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[6] The issue of Levisa's standing to seek injunctive relief was resolved by the Supreme Court, which found "no merit" to Consolidation's argument. (App. 24a).

without a full evidentiary hearing; (2) that the holding violated Consolidation's due process rights; and (3) that the absence of Island Creek, a necessary party, deprived the Supreme Court of the authority to adjudicate this dispute. The Supreme Court denied the petition, (App. 1a), and rejected Consolidation's motion to defer issuance of the mandate.

Remand to the Circuit Court

Following issuance of the mandate, the case was returned to the circuit court for "further proceedings" on Levisa's request for a permanent injunction. After a hearing on February 10, 2009, the circuit court granted Levisa's motion for partial summary judgment and entered a permanent injunction preventing Consolidation's continued dumping of wastewater into the VP3 Mine. (Supp.A.1).[7] Pursuant to the circuit court's order, dumping would cease on February 19, 2009. (*Id.*)

In an expedited proceeding limited to injunctions in Virginia, Consolidation petitioned one justice of the Supreme Court of Virginia to vacate the permanent injunction. Va. Code § 8.01-626. On March 17, 2009, an Order was entered by the Supreme Court dissolving the injunction so Consolidation could offer evidence in opposition to the request for injunctive relief. Therefore, the ruling which prompted Consolidation's Supplemental Petition to this Court has been reversed, and Consolidation will have an

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[7] References to the Appendix contained in the Supplemental Brief of Petitioner will be denoted "(Supp.A.__)."

opportunity to introduce evidence in defense of Levisa's requested injunction.

ARGUMENT

There are no compelling reasons to grant Consolidation's Petition. Sup. Ct. R. 10. Rather, there are four important reasons why this Court should refuse *certiorari*, each of which, standing alone, demonstrate that the question presented does not merit this Court's attention.

First, Consolidation's appeal asks this Court to grant certiorari to undo that which it expressly invited the Virginia courts to do – to decide Consolidation's rights by interpreting controlling and unambiguous agreements without additional evidence. Second, contrary to Consolidation's argument, (Pet. 12), the Supreme Court of Virginia's ruling does not conflict with this Court's precedent. Third, the Supreme Court of Virginia did not actually decide Consolidation's due process claim and, in any event, Consolidation's arguments to the Virginia courts demonstrate that it should have anticipated the very ruling it now appeals. Fourth, Consolidation has effectively appealed as to only one part of the Virginia court's holding, leaving an independent basis for the ruling unchallenged. Consequently, the appeal presents no compelling question for this Court to decide.

I. THE SUPREME COURT OF VIRGINIA DID NOT DEPRIVE CONSOLIDATION OF DUE PROCESS BY DECIDING ITS RIGHTS UNDER AGREEMENTS

THAT CONSOLIDATION ADMITTED WERE NOT ONLY CONTROLLING AND UNAMBIGUOUS, BUT CAPABLE OF INTERPRETATION AS A MATTER OF LAW WITHOUT EXTRINSIC EVIDENCE, WHICH THE COURT CORRECTLY DID IN ACCORDANCE WITH SETTLED VIRGINIA LAW.

The Supreme Court of Virginia correctly determined the fundamental question of law in this case – whether Consolidation has the legal right to dump wastewater into Levisa's mine – by interpreting two unambiguous agreements without the aid of extrinsic evidence, just as Consolidation asked it to.

A. Consolidation Invited the Virginia Courts to Interpret the Unambiguous 1956 Lease and the 1937 Deed Without Additional Evidence.

This entire appeal rests on Consolidation's claim that it was denied due process because it was not permitted to offer two deeds in the chain of title leading up to the 1937 Deed to Levisa. It asserts that these two deeds would establish that Levisa did, in fact, have the right to dump water from unrelated properties into its coal reserves. Consolidation fails to explain how even such a reversal would alter the Supreme Court of Virginia's independent interpretation of the 1956 Lease, finding it did not grant such rights. However, Consolidation's new argument in favor of extrinsic evidence simply cannot be squared with its longstanding position

that no extrinsic evidence is necessary to interpret the 1937 Deed or the 1956 Lease.

Consolidation invited the Virginia courts to determine its claimed legal right to dump water into the VP3 mine by interpreting the 1956 Lease and the 1937 Deed. (J.A. 249-251, 255, 257-262, 283, 285-286, 652-657). It repeatedly asserted that these two documents alone were determinative of its legal right to dump the wastewater, and characterized these agreements as the "controlling documents" in the issue before the court. (J.A. 257, 275, 283, 285). Underscoring the crucial role these agreements played, Consolidation even accused Levisa of intentionally ignoring them in order to help its case. (J.A. 250, 283-384). Consequently, Consolidation repeatedly reminded the circuit court that it should interpret its legal rights by reference to the 1956 Lease and the 1937 Deed alone, using them as both a sword and a shield.

Consolidation also objected to any evidence relating to the interpretation of the 1956 Lease, and told the circuit court that the 1956 Lease and 1937 Deed were unambiguous and should be interpreted without the aid of extrinsic evidence. (J.A. 285-286, 451, 656). In fact, the parties stipulated that these documents were unambiguous and should be interpreted as written, (J.A. 451, 453), leaving no question as to the court's job in this case. Accordingly, there was complete agreement that no extrinsic evidence was needed to interpret the plain language of the unambiguous documents. Under clear Virginia law, parties may not change their stated position as to whether a legal document is

ambiguous. *Berry v. Klinger*, 225 Va. 201, 206, 300 S.E.2d 792, 795 (1983) (the plaintiffs, "having contended in their pleadings and in their initial arguments at trial that the language in question was unambiguous, will not be allowed to take a contrary position thereafter.")

Similarly, although Consolidation steadfastly maintained throughout the entire case that these unambiguous documents alone decided the rights of the parties, it now asserts a constitutional claim premised on the notion that the 1956 Lease and 1937 Deed do not unambiguously determine the parties' rights. Having stipulated that the fundamental question in this case – its legal right to dump water – can be answered within the four corners of these unambiguous documents, Consolidation cannot maintain now that the Virginia courts should have considered other documents before adjudicating its rights. *Garlock Sealing Techs., LLC v. Little*, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2005) ("'[n]o litigant will be permitted to approbate and reprobate – to invite error . . . and then to take advantage of the situation created by his own wrong.'") (quoting *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003))); *Hansen v. Stanley Martin Cos.*, 266 Va. 345, 358, 585 S.E.2d 567, 575 (2003).

Consolidation now attempts to advance an argument that is completely at odds with what it claimed in the state courts. Its effort should be rejected. To do anything less would improperly permit the repeated recasting of legal arguments and theories, defeat the important purpose of finality in judicial

proceedings, and diminish genuine due process claims.

The record plainly shows that Consolidation relinquished its right to rely upon additional evidence when it agreed that the circuit court and Supreme Court of Virginia could, and should, declare its legal rights by interpreting the unambiguous language of the 1956 Lease and 1937 Deed. Having maintained throughout this case that these documents are controlling and unambiguous, and having failed to assign cross-error to the circuit court's adjudication of its rights without additional evidence, Consolidation has firmly wedded itself to a determination of its legal rights on the existing record.

Indeed, even now Consolidation has pointed to no ambiguity within the 1956 Lease that would allow parol evidence. Due process does not require that a litigant be guaranteed the right to introduce evidence to contradict a court's interpretation of a document which the litigant has represented to be unambiguous. The Due Process Clause provides no safe harbor to Consolidation on this record.

B. Under Virginia law, Extrinsic Evidence is Not Considered in Ascertaining the Plain Meaning of an Unambiguous Contract.

Even without Consolidation's sweeping new arguments about its new-found documents, the Supreme Court of Virginia correctly decided the question of Consolidation's rights under the unambiguous 1956 Lease and 1937 Deed as a matter

of law. Virginia law does not permit the introduction of extrinsic evidence to interpret an unambiguous contract. *E.g., Langman v. Alumni Ass'n. of the Univ. of Va.*, 247 Va. 491, 498-499, 442 S.E.2d 669, 674 (1994). Rather, "when the terms of a contract are clear and unambiguous, a court must given them their plain meaning." *Pocahontas Mining L.L.C. v. Jewell Ridge Coal Corp.*, 263 Va. 169, 173, 556 S.E.2d 769, 771 (2002). No party, including Consolidation, has a due process right to present extrinsic evidence in aid of the interpretation of an unambiguous contract.

Therefore, contrary to Consolidation's assertion, the Supreme Court did not decide the declaratory judgment on "an incomplete record." (Pet. 10).[8] It merely did what established Virginia law required and what Consolidation asked it to do. No due process violation can be found under these circumstances.

II. THERE IS NO COMPELLING GROUND TO GRANT *CERTIORARI* BECAUSE THE DUE PROCESS CASES UPON WHICH CONSOLIDATION RELIES DO NOT CONFLICT WITH THE SUPREME COURT OF VIRGINIA'S HOLDING.

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[8] Consolidation builds its Petition upon the fiction that the circuit court decision was on appeal to the Supreme Court of Virginia only on the preliminary injunction. As the record reflects, the appealed order also contained a final ruling of declaratory judgment in favor of Consolidation based on the trial court's legal interpretation of the 1956 Lease.

Consolidation bases its constitutional challenge on the broad assertion that a state court decision that precludes an opportunity to present parol evidence to interpret unambiguous documents violates the Due Process Clause. (Pet. 1). In support of this assertion, Consolidation relies upon three of this Court's due process cases, each of which is a product of unique facts and circumstances which are absent here. (Pet. 1, 12). In two of the cases an unexpected change in the law during the appeal surprised the litigants and, in the last case, a court forfeited property without allowing the owner to make a claim or to answer the charge. Thus, the petitioner in each of these cases was genuinely surprised by the appellate court's decision, which deprived the litigants of the fundamental right to be heard. Unlike Consolidation, none of the petitioners in these cases had invited the state courts to decide a question of law on the existing record.

As the following discussion demonstrates, the cases which Consolidation offers in support of its due process argument are easily distinguishable and do not advance its due process claim.

Consolidation describes this Court's 1917 decision in *Saunders v. Shaw*, 244 U.S. 317 as virtually identical to the case at bar. (Pet. 2). Relying heavily upon this Court's three paragraph decision, Consolidation claims that *Saunders* "essentially decided the exact issue presented in this case" and has facts that "mirror the facts here." (Pet. 12). Consolidation is wrong.

Saunders is a tax case from Louisiana. The plaintiff landowner sought an injunction against the collection of a local drainage tax. *Id.* at 318. At trial, the plaintiff attempted to introduce evidence showing that his land was located outside the system, was actually an island in the Gulf of Mexico, and could not be benefitted by that system. *Id.* The defendant tax commissioners and an intervenor objected to the evidence, and the court excluded it. *Id.* The defendant then introduced evidence that the land was not in the Gulf of Mexico. *Id.* Following a judgment for the defendant and the intervenor, the plaintiff appealed. *Id.* at 318-319.

The Supreme Court of Louisiana affirmed the judgment. *Id.* at 319. However, on a petition for rehearing, it reversed the trial court's judgment and entered an injunction against the assessment of plaintiff's land. *Id.* The Louisiana court based its reversal of the trial court's opinion, and its own opinion, on a new decision from this Court, which was "decided after the first decision." *Id.* Applying the new decision, the Louisiana court relied upon the evidence offered by the plaintiff which had been ruled inadmissible, finding that "the answer and testimony showed that the land was low and marshy, had not been benefited or drained and could not be drained under the present system." *Id.* The Louisiana Court then refused the intervenor's request for a rehearing. *Id.*

Appealing to this Court, the intervenor raised a due process challenge, arguing that "the case had been decided against him without his ever having had the

proper opportunity to present evidence." *Id.* This Court agreed, holding:

> when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view.

Id. Further, this Court held that the appeal properly could be taken because the "act complained of is the act of the [state] Supreme Court, done unexpectedly at the end of the proceeding, when [the defendant] no longer had any right to add to the record." *Id.* at 320.

Saunders bears little resemblance to this case. The Supreme Court of Virginia did not decide the declaratory judgment on the basis of a new decision, change in the law, or evidence that was ruled inadmissible at trial. Rather, it decided the question of Consolidation's legal rights on the basis of unambiguous agreements that Consolidation said were dispositive of the issue without further evidence. Nor can Consolidation legitimately claim, as the defendant could in *Saunders*, that the state appellate court's decision was unexpected. Having asked the Court to interpret the unambiguous agreements as a matter of law without resort to additional evidence, it cannot be surprised that it did so.

Consolidation's second authority, *Brinkerhoff-Faris*, also involved an unexpected change in the law – one rendered by the state appellate court itself. 281 U.S. 673 (1930). Like *Saunders*, this case concerns an action seeking to enjoin the collection of taxes. Plaintiff invoked the Missouri court's equity jurisdiction, alleging that it had no remedy at law and no administrative remedy. *Id.* at 674-675. The defendant maintained that the plaintiff "had not pursued remedies before the County or State Board of Equalization . . . [and] was guilty of laches in not so doing." *Id.* at 675. The trial court refused to hear the complaint, denied the injunction, and dismissed the case "without opinion or findings of fact." *Id.*

On appeal, the Missouri Supreme Court affirmed the trial court's decision. *Id.* It held that the plaintiff had an adequate legal remedy, and should have filed a complaint with the State Tax Commission in accordance with state law. *Id.* at 675-676. In so holding, however, the court "expressly overruled" a six-year-old decision in which it had held that the State Tax Commission did not have the "power to grant relief of the character here sought." *Id.* at 676. Further, the basis for this holding – that the plaintiff had an adequate legal remedy before the State Tax Commission – was not raised by any party during the litigation. *Id.* at 677. Although the defendant had asserted that the plaintiff had not availed itself of available administrative remedies before the Board of Equalization, "the answer significantly omitted any contention that there had been a remedy by application to the State Tax Commission." *Id.*

This Court reversed, holding that because the Missouri Supreme Court had denied the plaintiff "the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property." *Id.* at 679. Accordingly, the plaintiff was denied "an opportunity to present its case and be heard in its support." *Id.* at 681.

The unique facts in *Brinkerhoff-Faris* do not compel the same result here. Consolidation was not denied the opportunity to be heard because its case was rejected in the trial court or because of the unexpected abandonment of Virginia precedent at the appellate level. Rather, Consolidation's arguments to the circuit court established the framework for deciding the case on documents Consolidation vigorously argued both at trial and on appeal. Those arguments permitted the Supreme Court of Virginia, in accordance with well-established Virginia law, to do exactly what Consolidation invited it to do. *Brinkerhoff-Faris*, then, is distinguishable.

Finally, Consolidation mentions, but does not discuss, a third case in support of reversal of the decision below. (Pet. 1-2). Consolidation fails to explain how its due process argument is advanced by *Windsor v. McVeigh*, 93 U.S. 274 (1876), a case growing out of Civil War era legislation designed to "'suppress insurrection, to punish treason and rebellion, [and] to seize and confiscate the property of [confederate] rebels.'" *Id.* at 275. Pursuant to this legislation, a landowner's property in Alexandria,

Virginia was seized and forfeited to the United States on the claim that he was a "rebel." *Id.* at 275-276. Although the landowner appeared by counsel and filed an answer and claim to the property, the court struck the claim and answer on the basis that he was residing "within the Confederate lines" and was "a rebel"; it then "immediately" condemned the property. *Id.* at 276. Thus, the forfeiture was accomplished "in a judicial proceeding to which [plaintiff] was not allowed to appear and make answer to the charges against him." *Id.*

The fundamental and obvious deprivation of property without due process in *Windsor* finds no analogue here. Consolidation was given notice of the hearing, filed an answer, and appeared with counsel. The fact that it will not have an opportunity to introduce two documents on the question whether it has the legal right to dump water in the VP3 Mine is a product of its own doing, not the State's action.

Nothing in *Saunders*, *Brinkerhoff-Faris* or *Windsor* provides a compelling reason to grant this Petition. The differences between these cases and the case at bar are so pronounced as to preclude any meaningful comparison. In short, the Supreme Court of Virginia's holding does not conflict with this Court's due process cases.

III. CONSOLIDATION'S PETITION IS NOT PROPERLY BEFORE THE COURT BECAUSE IT REASONABLY SHOULD HAVE EXPECTED THE SUPREME COURT OF VIRGINIA TO INTERPRET THE 1956 LEASE AND THE 1937 DEED

AS A MATTER OF LAW, WITHOUT PAROL EVIDENCE, AND THAT COURT DECLINED TO ENTERTAIN ITS DUE PROCESS CLAIM.

Consolidation incorrectly states that "there can be no doubt that the due process issue raised here is properly before the Court." (Pet. 17). To the contrary, Consolidation has not satisfied the requirements for raising on *certiorari* a federal question not decided by state court.

A. The Federal Claim was "Not Pressed or Passed Upon" Below.

This Court will not review a federal constitutional issue raised for the first time on review of a state court decision. *Clark v. Arizona*, 548 U.S. 735, 765 (2006); *Howell v. Mississippi*, 543 U.S. 440, 443-45 (2005); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935). Unless the constitutional issue was "raised and decided" in the state court, *certiorari* will not be granted. *Cardinale*, 394 U.S. at 438. This principle, known as the "not pressed or passed upon" rule, is a roadblock to the exercise of this Court's review in the present case.

The requirements of the rule are not met merely by filing a post-judgment motion for reconsideration containing a previously unadvanced constitutional claim. Rather, the state court must actually take up and analyze the question on its merits. *Herndon*, 295 U.S. at 443 ("The long-established general rule is that the attempt to raise a federal question after

judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.") In *Herndon*, the appellant presented his constitutional question on a motion for rehearing after the state supreme court affirmed a judgment against him. The state court refused to consider the motion, and this Court found that this refusal did not satisfy the requirement that the state court "pass upon" the constitutional issue. *Id.* at 442-43.

Here, Consolidation's due process argument was not timely raised below or as an issue of cross-error on appeal. Rather, Consolidation presented its due process claim in a petition for rehearing after the Supreme Court of Virginia rendered its unanimous decision in this case. However, that Court declined to entertain the federal claim, leaving no record of a decision for this Court to review. These facts bring this case squarely under the rule.

B. No Exception to the "Not Pressed or Passed Upon" Rule Exists Because Consolidation Cannot Legitimately Claim Surprise that the Virginia Court Followed the Principles of Contract Interpretation as Consolidation Requested.

Nor can Consolidation avail itself of an exception to the "not pressed or passed upon" rule by claiming that it was surprised by the Virginia Court's ruling, and raised the issue at the first available opportunity (Pet. 17-18). The exception to the general rule, as articulated in *Herndon*, 295 U.S. at

443-444, is not so broad as to give Consolidation a right to *certiorari* simply because the Virginia court decided a question of state law in a manner unfavorable to it.

Consolidation plainly should have anticipated that the Supreme Court of Virginia would rule on the contract at issue as a matter of law in one way or another, just as the circuit court had done without any objection by Consolidation. It obviously hoped for a ruling in its favor, but the fact that the ruling went the other way does not create grounds to now complain about the process. In Virginia, the interpretation of the provisions of a contract presents a question of law that the appellate court reviews *de novo*. *Eure v. Norfolk Shipbuilding and Drydock Corp., Inc.*, 263 Va. 624, 634, 561 S.E.2d 663, 669 (2002) ("on appeal we are not bound by the trial court's interpretation of the contract provision at issue; rather, we have an equal opportunity to consider the words of the contract within the four corners of the instrument itself.") Thus, when Consolidation sought judicial interpretation of the unambiguous documents, it necessarily requested a determination of a question of law based solely on the four corners of those documents.

The very cases that Consolidation cites as support for its due process claim illustrate why it has not timely presented this Court with a federal claim for review. In *Saunders*, 244 U.S. at 320 and *Brinkerhoff-Faris Trust & Sav. Co.*, 281 U.S. at 676-677, the petitioners were legitimately surprised when the state appellate courts decided their cases by changing established legal principles and, in the

later case, by reversing controlling precedent. *Saunders* was decided on evidence that had been refused by the trial court, thereby depriving the petitioner of the any opportunity to challenge it. In *Brinkerhoff-Faris*, the state appellate court's decision was based upon a theory not advanced by either party, was made without giving the petitioner the first chance to make its case, and deprived the petitioner of the only available legal remedy it had. And, in a textbook due process case, the petitioner in *Windsor* simply never had a chance to be heard.

These cases all decided issues involving some question of fact as a matter of law without giving the petitioner an opportunity to be heard or contest the decision. Consolidation does not explain why the question of law the Supreme Court of Virginia decided on a record Consolidation claimed was complete now constitutes a federal constitutional violation. It cannot.

Consolidation cannot legitimately claim surprise that the Supreme Court of Virginia interpreted the 1956 Lease as a matter of law; this is exactly what it asked for all along. Consequently, the due process question is not properly before the Court.

IV. CONSOLIDATION'S PETITION FOR *CERTIORARI* CHALLENGES JUST ONE OF TWO GROUNDS FOR THE SUPREME COURT OF VIRGINIA'S RULING, PRECLUDING THIS COURT FROM DECIDING A MATTER DISPOSITIVE TO THE ENTIRE CASE.

Consolidation urges consideration of only the Pobst/Combs Deed and the 1908 Deed. Although these deeds are referred to in the 1937 Deed, they are not mentioned in the 1956 Lease. At most, then, the evidence that Consolidation now presents relates only to the interpretation of Levisa's rights under the 1937 Deed, not to whether Levisa granted such rights to Island Creek under the 1956 Lease.

The Supreme Court of Virginia interpreted both the 1937 Deed and the 1956 Lease, as Consolidation requested, and found that neither document conferred the rights Consolidation claimed. It specifically held that "... the lease did not expressly purport to convey any right to use the leasehold for the support of mining operations on other lands." (App. 4a). "Clearly, Island Creek did not stipulate for such a use of the leasehold in the 1956 lease, nor could Levisa Coal have granted such rights even if they had been sought." (App. 22a-23a). Because the Virginia court decided both issues as a matter of law, Consolidation's Petition addresses only one of the two independent grounds that support the Court's ruling – its interpretation of the 1937 Deed – while leaving the Court's interpretation of the 1956 Lease untouched.[9]

Thus, even if Consolidation is right that the 1908 Deed and the Pobst/Combs Deed bear upon a proper

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[9] Consolidation initially attempted to avoid this problem in its petition for rehearing by arguing that the Supreme Court of Virginia could not construe the 1956 Lease without Island Creek, which it claimed was a necessary party. However, Consolidation now has abandoned its necessary party argument.

interpretation of the 1937 Deed and even grant the right to dump water from foreign mining operations, the Supreme Court of Virginia's conclusion that Consolidation has no right to dump its wastewater in the VP3 Mine under the 1956 Lease is still an independent, and unchallenged, foundation for its decision in this case. No ruling by this Court, then, would pass upon the entire opinion by the Supreme Court of Virginia, rendering such review futile.

CONCLUSION

This case involves the simple application of traditional principles of state law to the question of whether Consolidation has a legal right to dump contaminated water into another's mine. The Supreme Court of Virginia correctly decided this issue within the four corners of the 1956 Lease and the 1937 Deed, which the parties agreed controlled determination of the question whether Consolidation had a legal right to dump its water into the VP3 mine. And it did so only after Consolidation invited the Court to interpret these documents without additional evidence. Thus, Consolidation's own words and actions defeat its due process claim.

Nor is the due process claim properly before the Court. The Supreme Court of Virginia did not decide the issue, which Consolidation presented only after it received an unfavorable interpretation of the controlling documents in the case. Further, Consolidation finds no shelter from the "not pressed or passed upon" rule because it could not be surprised that the documents were interpreted as a

matter of law, in accordance with well-established Virginia law and its own request.

Consequently, this Court should deny the Petition.

Respectfully submitted,

LEVISA COAL COMPANY

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(2)

No. 08-865

IN THE
Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

SUPPLEMENTAL BRIEF OF PETITIONER

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February 19, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Petitioner Consolidation Coal Co. files this supplemental brief to alert the Court to recent developments in this case upon remand to the Circuit Court for Buchanan County, Virginia. Recent action by the Circuit Court entering a permanent injunction against Consolidation without providing Consolidation any opportunity to present evidence confirms that this Court should grant Consolidation's petition for a writ of certiorari to the Supreme Court of Virginia.

In its petition, Consolidation explained that review by this Court is necessary because the Supreme Court of Virginia violated long-standing precedent under the Due Process Clause by determining Consolidation's rights without permitting Consolidation any opportunity to present evidence in its defense. *See Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917); *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876); *see also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). This case reached the Supreme Court of Virginia on a truncated, one-sided record because the trial court had denied respondent Levisa Coal Co.'s motion for a preliminary injunction at the close of Levisa's evidentiary case. Consolidation thus had no need, and no opportunity, to present evidence in the trial court. On review, however, the Supreme Court of Virginia definitively determined Consolidation's rights even though Consolidation had no opportunity to present evidence relevant to the interpretation of a governing lease. In particular, Consolidation did not even have the chance to put in the record two critical documents that defined the rights addressed in the lease. *See* Pet. at 7–11.

If there could have been any doubt that the Supreme Court of Virginia's decision definitively determined Consolidation's rights, the actions of the Circuit Court for Buchanan County last week eliminated that doubt. On remand from the Supreme Court of Virginia, the Circuit Court held a hearing on February 10, 2009. At that hearing, the Circuit Court treated the Supreme Court of Virginia's interpretation of the lease as dispositive and, although Consolidation again complained that it had never had any opportunity to present any evidence, proceeded to enter a permanent injunction without providing Consolidation the chance to put on evidence in its defense. *See* Supp.A1. The Circuit Court's order confirms that the Supreme Court of Virginia's decision violates this Court's precedent under the Due Process Clause. This Court has long made it clear under circumstances identical to those presented here that a state court may not definitively determine a party's rights without providing the party an opportunity to present evidence. *See, e.g., Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917).

The Circuit Court's action also confirms that, absent relief from this Court, Consolidation will *never* have the opportunity to present evidence in its own defense. The Due Process Clause requires more. Granting the writ is necessary to ensure that, consistent with this Court's due process jurisprudence, Consolidation is afforded the most basic of rights — an opportunity to present evidence in its defense.

For these reasons, and for the reasons stated in Consolidation's petition, the Court should grant the

petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE COUNTY OF BUCHANAN

LEVISA COAL COMPANY, a Virginia Limited Partnership and L.L.P.,	)	
Plaintiff,	)	
v.	)	Case No. CL06000408-01
CONSOLIDATION COAL COMPANY,	)	
Defendant.	)	

ORDER

On February 10, 2009 the parties appeared for hearing on Plaintiff's Motion for Partial Summary Judgment and Motion to Restrict Equitable Defenses. Upon consideration of the pleadings, the argument of counsel, and the record as a whole, and for the reasons advanced by the plaintiff, plaintiff's Motion for Partial Summary Judgment as to its request for permanent injunction is hereby GRANTED. Consolidation is hereby permanently enjoined from the further dumping of water into the VP3 Mine. All further dumping shall immediately cease on February 19, 2009 at 2:00 p.m.

All other issues are hereby reserved for trial or for decision by further order of the Court.

The Clerk is requested to certify copies of this Order to all counsel of record.

ENTERED this 10th day of February, 2009.

/s/
Hon. Ford C. Quillen

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(3)

No. 08-865

IN THE
Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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March 31, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

Petitioner Consolidation Coal Co. files this supplemental brief to apprise the Court of recent developments in the Virginia Supreme Court. As Consolidation informed the Court in its supplemental brief of February 19, 2009, the Circuit Court for Buchanan County, Virginia entered a permanent injunction against Consolidation, prohibiting Consolidation "from the further dumping of water into the VP3 mine." Supp.A1. Following this order, Consolidation filed a petition for review to the Virginia Supreme Court.

On March 17, 2009, the Virginia Supreme Court issued an order dissolving the injunction. *See* 2d Supp.A1–4. In its order, the Virginia Supreme Court reaffirmed its holding that Consolidation does not have the legal right to store water in the VP3 mine, but noted that there remains an "insufficient record . . . to resolve the issue of Levisa Coal's entitlement to injunctive relief." 2d Supp.A2 (quoting *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 59, 662 S.E.2d 44, 52 (2008) (App.23a)). Because "the circuit court has not given the parties adequate opportunity to present evidence *on these issues*," 2d Supp.A4 (emphasis added), the Virginia Supreme Court ordered that "the portion of the Circuit Court of Buchanan County's order of February 10, 2009 granting a permanent injunction in favor of Levisa . . . is dissolved," 2d Supp.A1.

By its terms, this order addressing the question of remedy does not modify the Virginia Supreme Court's prior ruling concerning Consolidation's rights, which is the subject of Consolidation's petition before this Court, and thus does not affect the reasons for granting the petition. Although the

Virginia Supreme Court has ordered that Consolidation must be allowed to present evidence regarding the proper *remedy*, Consolidation still has had no opportunity (and will have no such opportunity) to present its evidence and defenses on the underlying issue on the *merits*—its right to store water in the VP3 mine. Indeed, the Virginia Supreme Court eliminated doubt on this score by quoting its earlier holding that this is "a case of a continuing trespass." 2d Supp.A3 (quoting *Levisa*, 276 Va. at 61, 662 S.E.2d at 53 (App.26a)).

The Virginia Supreme Court is correct that Consolidation must be allowed to present evidence regarding the proper remedy. But this legally sound order does not change the court's earlier ruling that determines Consolidation's legal rights (*i.e.*, its right to store water in the VP3 mine) without allowing Consolidation any opportunity to present evidence *on that issue.* It is this holding that violates due process. *See, e.g.*, *Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917); *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). Granting the writ is necessary to ensure that, consistent with this Court's due process jurisprudence, Consolidation is afforded the basic right to present evidence in its defense.

For these reasons, and for the reasons stated in Consolidation's petition and supplemental brief, the Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
held at the Supreme Court Building in the City of Richmond on Tuesday the 17th day of March, 2009.

Before Justices Koontz and Lemons and Senior Justices Carrico and Russell.

Consolidation Coal Company,	)	
	)	
Petitioner,	)	
	)	Record No. 090356
against	)	Circuit Court No.
	)	CL06000408-01
Levisa Coal Company,	)	
Limited Partnership	)	
and L.L.P,	)	
	)	
Respondent.	)	

Upon a Petition Under Code § 8.01-626

Upon consideration of the petition filed pursuant to Code § 8.01-626, the respondent's brief in opposition and motion to dismiss, and the petitioner's opposition to the motion to dismiss, the petition is granted and the portion of the Circuit Court of Buchanan County's order of February 10, 2009 granting a permanent injunction in favor of Levisa Coal Company, Limited Partnership and L.L.P. ("Levisa") and against Consolidation Coal Company ("Consolidation") is dissolved.

In our opinion in Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 662 S.E.2d 44 (2008), we stated:

> Because the circuit court premised its judgment to deny Levisa Coal's request for injunctive relief, at least in part, on its erroneous determination that Consolidation Coal had the right to store excess water from the Buchanan Mine in the VP3 Mine, we will reverse that judgment. Additionally, because the circuit court rendered that judgment in the procedural posture of the case which resulted in an insufficient record for this Court on appeal to resolve the issue of Levisa Coal's entitlement to injunctive relief, we will also remand the case for further consideration of that issue by the circuit court.

Id. at 59, 662 S.E.2d at 52. We observed that the record before us was not sufficient to establish Levisa's entitlement to injunctive relief and we remanded the matter to the circuit court "for further proceedings consistent with the views expressed in [the] opinion" and directed the circuit court on remand to be guided by the principles articulated in the opinion "after granting the parties the opportunity to present evidence regarding them." Id. at 63, 662 S.E.2d at 54. In our opinion we further stated:

The principles that a court must apply in properly exercising its discretion to grant or deny a permanent injunction have been identified in prior decisions of this Court. "Under traditional equitable principles, a chancellor may enjoin a continuing trespass." Fancher [v. Fagella], 274 Va. [549,] 556, 650 S.E.2d [519,] 522 [(2007)]. See also Nishanian v. Sirohi, 243 Va. 337, 339, 414 S.E.2d 604, 606 (1992); Mobley v. Saponi Corporation, 215 Va. 643, 645, 212 S.E.2d 287, 289 (1975). However, even in a case involving a continuing trespass the guiding principle which remains constant is that the granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. See, e.g., Fancher, 274 Va. at 556, 650 S.E.2d at 522; Seventeen, Inc. [v. Pilot Life Ins. Co.], 215 Va. [74,] 78, 205 S.E.2d [648,] 653 [(1974)]; Akers [v. Mathieson Alkali Works], 151 Va. [1,] 8, 144 S.E. [492,] 494 [(1928)]. Thus, in a case of a continuing trespass, such as the present case, we have stated that if "the loss entailed upon [the trespasser] would be excessively out of proportion to the injury suffered by [the owner], or a serious detriment to the public, a court of equity might very properly . . . deny the injunction and leave

> the parties to settle their differences in a court of law." Clayborn [v. Camilla Red Ash Coal Co.], 128 Va. [383,] 399, 105 S.E. [117,] 122 [(1920)].

Id. at 61, 662 S.E.2d at 53.

At this stage of the proceedings, we express no view as to the entitlement of Levisa to a temporary or permanent injunction. As we stated in our opinion and mandate, upon remand the circuit court is to resolve this question and other related issues in the litigation "after granting the parties the opportunity to present evidence regarding them." Id. at 63, 662 S.E.2d at 54. We hold that the circuit court has not given the parties adequate opportunity to present evidence on these issues. Accordingly, the permanent injunction is dissolved and the matter is remanded to the circuit court for further proceedings guided by the principles contained in our opinion and granting the parties opportunity to present evidence.

A copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/

Deputy Clerk

No. 08-865

IN THE
Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY TO BRIEF IN OPPOSITION

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April 14, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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TABLE OF AUTHORITIES

GLOSSARY

"Pet."	Petition for Writ of Certiorari filed by Petitioner Consolidation Coal Co. (Dec. 16, 2008)
"Opp."	Brief in Opposition filed by Respondent Levisa Coal Co. (Apr. 2, 2009)
"App."	Appendix to Petition for Writ of Certiorari (Dec. 16, 2008)
"Supp.A"	Appendix to Supplemental Brief of Petitioner Consolidation Coal Co. (Feb. 19, 2009)
"2d Supp.A"	Appendix to Second Supplemental Brief of Petitioner Consolidation Coal Co. (Mar. 31, 2009)
"Reply.A"	Appendix to Reply Brief of Petitioner Consolidation Coal Co. (Apr. 14, 2009)
"Va.Rec."	Joint Appendix in Virginia Supreme Court (relevant excerpts reprinted at App.32a–38a; Reply.A1–35).

INTRODUCTION

The central theme of Levisa's Brief in Opposition is that Consolidation supposedly told the Virginia Supreme Court that the court could definitively determine the parties' rights under the 1956 Lease and 1937 Deed without looking at any other document and that Consolidation cannot complain now if the court failed to consider the 1908 Deed and the Pobst/Combs Deed. That theory both distorts the record and misstates the law. Consolidation did argue that the 1956 Lease and the 1937 Deed are "unambiguous" and can be construed without extrinsic evidence. But that is not the same as saying that those documents could be construed without looking at prior documents in the chain of title that were incorporated by reference in the 1956 Lease and the 1937 Deed to define the rights at issue in those contracts. As a matter of law, such documents incorporated by reference are not "extrinsic evidence," and looking to them does not suggest that the 1956 Lease or 1937 Deed is ambiguous.

Levisa's central argument is thus nothing more than a sleight of hand. Indeed, every one of Levisa's numerous record citations misstates Consolidation's actual argument to the state courts. By arguing that the 1956 Lease and 1937 Deed were "unambiguous," and by objecting to Levisa's attempts to introduce extrinsic evidence (in the form of witness testimony), Consolidation was not suggesting that the 1956 Lease or 1937 Deed could be read without reference to the prior deeds. To the contrary, Consolidation expressly argued before the Virginia Supreme Court that Levisa's case failed in part because Levisa had

failed to introduce the 1908 Deed and the Pobst/Combs Deed into evidence. *See infra* pp.5–6.

Levisa's ancillary arguments are also easily dismissed. Contrary to Levisa's claim, after Consolidation *won* in the trial court, it was not required to file a cross-appeal asserting a due process error; indeed, it could not have done so because the due process error had not even occurred yet. Nor was Consolidation required to anticipate that the Virginia Supreme Court would violate due process principles by ruling against it without permitting any remand. When the court did so, Consolidation preserved its due process claim by raising it at the first opportunity — its petition for rehearing in the Virginia Supreme Court.

Levisa also errs in arguing that there is an adequate and independent state law ground for the decision below. The claim that the Virginia Supreme Court rendered two independent holdings is false. That court made only one holding: an interpretation of the 1956 Lease that depended critically on a reading of the 1937 Deed.

Finally, on the substance of Consolidation's due process claim, Levisa's attempts to distinguish this Court's prior decisions are meritless. This Court has made clear that a state court may not rule against a party without permitting that party an opportunity to put on a defense. Because the Virginia Supreme Court did exactly that, review is warranted.

REASONS FOR GRANTING THE WRIT

I. Consolidation Did Not Waive Its Due Process Argument.

Levisa's primary argument is that Consolidation cannot raise a due process claim now because the Virginia Supreme Court did "what Consolidation asked it to do." Opp. 18. According to Levisa, by arguing that the 1956 Lease and 1937 Deed were "unambiguous" and could be interpreted by the court without resort to extrinsic evidence, Consolidation was telling the court that it could definitively interpret the contracts before it without ever looking at the text of earlier documents (the Pobst/Combs Deed and the 1908 Deed) that were incorporated by reference. *See id.* at 14–17. That claim misrepresents the record and distorts basic principles of contract law.

As an initial matter, the Pobst/Combs Deed and the 1908 Deed are *not* "extrinsic evidence" or "parol evidence." Extrinsic evidence, by definition, is evidence regarding prior oral or written communications between the parties that is outside the corners of the contract. See 11 WILLISTON ON CONTRACTS § 33:1 (4th ed.); *see also Durham v. National Pool Equipment Co. of Va.*, 138 S.E.2d 55, 59 (Va. 1964).

The Pobst/Combs Deed and the 1908 Deed, in contrast, are previous deeds in the chain of title that are incorporated by reference in the 1956 Lease and the 1937 Deed. The 1956 Lease references the 1937 Deed, App.39a–40a, which in turn explicitly references the 1908 Deed, App.45a, and conveys to

Levisa "all rights, privileges, and easements . . . which were acquired" in the Pobst/Combs Deed, App.45a–46a. The operative terms of both the 1956 Lease and the 1937 Deed are thus defined by reference to the prior deeds. It is, of course, perfectly appropriate to look at other documents referenced within the four corners of a contract. *See W. D. Nelson & Co. v. Taylor Heights Dev. Corp.*, 150 S.E.2d 142, 146 (Va. 1966) ("[w]ritings referred to in a contract are construed as part of the contract" for the purpose specified and are not parol evidence); *accord Guereni Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916). Moreover, looking to such documents does not mean that the contract is ambiguous. It simply means that the court must examine all of the writings incorporated into the contract to determine the unambiguous meaning of the text.

Placing Consolidation's arguments in the context of the actual procedural history (not Levisa's distorted version) confirms that Consolidation never told the lower courts that the parties' rights could be determined definitively without looking at the Pobst/Combs Deed and the 1908 Deed.

In the trial court, Levisa moved for a preliminary injunction. In opening statements at the hearing on that motion, Consolidation anticipated arguments relating to success on the merits and argued that the 1956 Lease and 1937 Deed were "controlling" and "unambiguous." *See* Reply.A13–14, 17, 20. That did not remotely mean that those contracts could be interpreted without looking at the prior deeds.

At the close of Levisa's case, Consolidation decided it was unnecessary to present a full

argument on the meaning of the 1956 Lease. Instead, Consolidation moved to strike solely on the ground that Levisa had not shown irreparable harm. *See* Va.Rec. 624 (Reply.A27) ("Their case fails, and I will deal with just one narrow point of it, with respect to irreparable harm."); *see also id.* at 626 (Reply.A28–29); *id.* at 658–59 (Reply.A35). The trial court agreed and denied the preliminary injunction. Then, at *Levisa's request* the trial court also entered an order dismissing Levisa's claims on the merits, thereby giving Levisa an appealable order. App.31a ("[U]pon request by the Plaintiff, the Court has construed the [1956 Lease] . . . .").

On appeal, Consolidation defended the decision on the record developed in the trial court. Thus, Consolidation argued that the 1956 Lease and the 1937 Deed on their faces were sufficient to prevent Levisa from succeeding on *its* case and to sustain the ruling from below. Consolidation did not argue that these documents alone could be used to determine definitively the parties' rights. To the contrary, Consolidation pointed out to the Virginia Supreme Court that Levisa could not prove its central argument because it had not put the Pobst/Combs Deed and 1908 Deed into evidence. Levisa argued that it could not have granted the right to store water in the 1956 Lease because it had never acquired that right. Consolidation explained:

> [Levisa's] argument fails because Levisa did not offer any evidence to establish that it was granted any less rights than it conveyed to Island Creek. Levisa obtained its rights from the [1937] Deed . . . . Levisa failed to offer the deeds conveying the coal estate to Prater

> [the 1908 Deed] to prove what rights Prater had or the [Pobst/Combs] Deed to the Pobst Heirs, so as to prove what rights the Pobst Heirs had to convey to Levisa [in the 1937 Deed]. Having failed to offer those deeds, Levisa presents no factual foundation for this argument, and it fails.

Brief of Appellee Consolidation Coal, No. 070580, at 29–30 (emphasis omitted). Consolidation thus made clear that it was necessary to look at both prior deeds to interpret the 1956 Lease. Levisa's claim that "Consolidation now attempts to advance an argument that is completely at odds with what it claimed in the state courts," Opp. 16, is simply false.

Indeed, Levisa's arguments on this point are littered with misstatements or distortions.

First, Levisa repeatedly claims that Consolidation "steadfastly maintained" that the 1956 Lease and the 1937 Deed "alone decided the rights of the parties" without reference to the other deeds. Opp. 16 (emphasis in original); *see also id.* at 7, 15. Levisa provides no record citations to support these statements because there are none. Consolidation did not make such arguments.

Second, Levisa cites Consolidation's opening statement in the preliminary injunction hearing. *See, e.g.*, Opp. 6, 15 (citing Va.Rec. 249–51, 255–62, 275, 283–86 (Reply.A2–21)). But that statement merely previewed many reasons that Levisa was not entitled to preliminary relief. By citing the 1956 Lease and 1937 Deed at that point in the hearing, Consolidation was certainly not asking the court to rule definitively without looking at other documents. Indeed, on the very pages Levisa cites, Consolidation

stated that other "documents" (plural) would have to be examined:

> In terms of contract interpretation I suggest to the Court that the lease and the other *documents* are clear and unambiguous and the Court can and should interpret the *documents* and I don't think extrinsic evidence is necessary or proper.

Va.Rec. 286 (Reply.A19–20) (emphasis added). Because Consolidation moved to strike at the end of Levisa's case, Consolidation never needed to show exactly which documents the court would have to examine to understand fully the 1956 Lease.[1]

Third, Levisa misrepresents the record by suggesting that Consolidation "stipulated," Opp. 15, that no other documents were necessary to determine completely the parties' rights. Levisa's only citation for this proposition is Consolidation's objection when Levisa attempted to have a witness testify about the meaning of the 1956 Lease. *See, e.g.*, Opp. 15 (citing Va.Rec. 451, 453); Opp. 5 (same). Consolidation objected that "the document is going to speak for itself and [the court] is going to make those findings." Va.Rec. 453 (Reply.A25); *see also id.* at 451 (Reply.A24). Needless to say, objecting to

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[1] Similarly, Levisa points to arguments Consolidation made in reply on its motion to strike. Opp. 6 (citing Va.Rec. 652–57 (Reply.A30–35)). Again, responding to Levisa's arguments about the 1956 Lease in that context was not inviting the court to rule definitively on the parties' rights. Indeed, in making these arguments Consolidation explained that it would respond fully to Levisa's claims only "[w]hen we have a chance to prove our case." Va.Rec. 658 (Reply.A35).

witness testimony about a contract is not the same as saying that the contract can be interpreted without reading prior deeds incorporated into it.

II. Consolidation Properly Raised Its Due Process Claim.

Levisa's assertion that Consolidation did not properly preserve its due process claim is also meritless. In part, Levisa faults Consolidation for failing to raise a due process claim as "an issue of cross-error on appeal" before the Virginia Supreme Court. Opp. 26. This argument is frivolous.

At that point in the case, Consolidation could not have raised such a claim because there had been no due process violation. Consolidation *won* in the trial court. *See* App.30–31a. There was thus no due process error that would give rise to a cross-appeal. The due process violation did not arise until the Virginia Supreme Court ruled *against* Consolidation without permitting Consolidation any opportunity to put on its defense.[2]

Consolidation raised this argument at its first opportunity — its petition for rehearing to the Virginia Supreme Court. Under this Court's precedent, this was entirely proper. *See, e.g.*, *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.3 (1996); *Herndon v. Georgia*, 295 U.S. 441, 444

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[2] Contrary to Levisa's suggestion, Opp. 3, both the Petition and Question Presented make clear that the due process violation consists of denying Consolidation the opportunity both "to present evidence in its defense" *and* "to raise its affirmative defenses."

(1935); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). As explained in *Saunders*:

> [W]hen the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.

Saunders, 244 U.S. at 320.

Levisa's only response on this point is to argue that Consolidation "plainly should have anticipated" that the Virginia Supreme Court might disagree with the trial court's interpretation of the 1956 Lease. Opp. 27. That much is true. But all that means is that the Virginia Supreme Court might have held that it was error to rule against Levisa at the close of Levisa's case (and based on the face of the 1956 Lease) and might have remanded for the trial court to entertain Consolidation's case. Levisa tries to go a step further — and goes a step too far — by suggesting that Consolidation should have anticipated that the Virginia Supreme Court would rule definitively on the meaning of the 1956 Lease "one way or another." Opp. 27. Consolidation had no reason to expect that, instead of remanding, the court would definitively interpret the lease against Consolidation based only on the one-sided record developed below. As this Court stated in *Saunders*, "[t]he defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance." 244 U.S. at 320.

Moreover, Consolidation could not simply make new arguments in the Virginia Supreme Court based on documents — the Pobst/Combs Deed and the 1908 Deed — that were not part of the record. *See* Va. Sup. Ct. R. 5:10 (limiting the record on appeal to, *inter alia*, "each exhibit offered in evidence . . . and initialed by the trial judge"); *Delk v. Virginia State Bar*, 355 S.E.2d 558, 560 n.2 (Va. 1987) (court may not consider documents not part of the record below).

Instead, Consolidation did exactly what it was supposed to do. It defended the trial court's judgment on the record as it stood and assumed that, if the Virginia Supreme Court disagreed with the trial court, it would remand to permit Consolidation to present its defense. When the Virginia Supreme Court did not do this, Consolidation properly raised the due process issue on a petition for rehearing, just as the petitioner had in *Saunders*.

III. The Decision Below Does Not Rest on an Adequate and Independent State Ground.

As a last-ditch procedural argument, Levisa half-heartedly claims that the court below based its judgment "on two grounds," only one of which is vulnerable to Consolidation's due process claim. Opp. 10. According to Levisa, the Virginia Supreme Court issued one holding interpreting the 1937 Deed and an independent holding interpreting the 1956 Lease entirely apart from the 1937 Deed. *Id.* at 28–30. That is incorrect.

The Virginia Supreme Court made only one holding: that the 1956 Lease could not have granted Consolidation's subsidiary (Island Creek) the right to store water in the mines at issue because Levisa did not obtain that right in the 1937 Deed. The very

passages in the opinion Levisa cites for a supposed alternative holding show only one holding, entirely dependent on the 1937 Deed:

> Thus, Levisa Coal maintains that it did not obtain the right under the 1937 deed to support mining operations on other lands by permitting the inundation of the subsurface area with wastewater. Accordingly, Island Creek Coal could not have obtained the right to do so within its leasehold because the 1956 lease expressly limited the easements Levisa Coal granted to Island Creek Coal "to such rights as [Levisa Coal] owns and has the right to lease." We agree with Levisa Coal.

App.19a (cited at Opp. 10). The court reiterated its holding later in the opinion: "Since the 1937 deed conveyed no right to use any portion of the mineral estate to support mining operations on other lands, the 1956 Lease could not have granted such right . . . ." App.22a (cited at Opp. 29). The only other citation Levisa provides is to a passing description of the 1956 Lease in the "Background" section of the opinion. *See* Opp. 29 (citing App.4a). That is plainly not a holding.

IV. The Virginia Supreme Court's Decision Violated this Court's Due Process Jurisprudence.

Levisa's arguments on the substance of the due process issue are also meritless. Levisa tries to distinguish *Saunders v. Shaw*, 244 U.S. 317 (1917), and *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), on the theory that those cases involved a party who was "genuinely surprised" by a change in the law. Opp. 21–23. It is true that the

cases involved a change in the law, and perhaps surprise, but neither factor was relevant to the due process question.

The change in the law is what prompted the lower court in each case to rule suddenly against the petitioner without allowing the petitioner a chance to put on its case. *See Saunders*, 244 U.S. at 318–19; *Brinkehoff-Faris*, 281 U.S. at 678. The due process violation, however, turned solely on the fact that the court ruled against the petitioner "without giving him a chance to put his evidence in." *Saunders*, 244 U.S. at 319; *accord Brinkerhoff-Faris*, 281 U.S. at 678. That is precisely what the Virginia Supreme Court did here by ruling against Consolidation before allowing it to present its defense. There is no meaningful distinction between the ruling held to violate the Due Process Clause in *Saunders* and the Virginia Supreme Court's ruling here.

CONCLUSION

The Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

REPLY APPENDIX
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VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BUCHANAN

LEVISA COAL COMPANY, a Virginia Limited Partnership and L.L.P.,	:	
Plaintiff	:	Case No. CL06000408-00
--vs--	:	
CONSOLIDATION COAL COMPANY,	:	
Defendant	:	

November 15, 2006
9:00 a.m.

HEARD BEFORE:

THE HONORABLE KEARY R. WILLIAMS

[p.249]

* * *

MR. ALLEN: Good morning, your Honor. I apologize in advance because my statement is going to be somewhat longer than Mr. Street's because I -- it is not as simple as Mr. Street has said, and I don't think he stated the facts exactly. Your Honor, Consolidation Coal Company Inc., is the named defendant here. Island Creek Coal Company, as he referenced, is the wholly-owned subsidiary of Consolidation. They are both members of the family of Consol Energy, Inc.

Levisa says that Consolidation is storing the water. It is not. Island Creek is storing the water pursuant to the 1956 coal lease. The failure to plead facts that are important doesn't [p.250] make them go away and it doesn't change the facts. I will tell you, your Honor, this case is about money and I think hopefully when I finish my statement, and as you hear the evidence, you will see that it is about money more or less, nothing more and nothing less.

What Levisa's motion seeks to do, if granted, is it will shut down the mechanics of this mine. We admit Levisa has excess water and excess water has to be disposed of and the affect of granting this motion will shut down Levisa. Buchanan No. 1 mine is one of the largest mines in the country and one of Buchanan County's largest employer and sources of revenue.

As a damage claim, which is really what this is, what Levisa attempts to do is to force Consolidation to pay now -- or Island Creek to pay now for coal or gas reserves that may or may not ever be produced in the future.

And, your Honor, several simple facts are pertinent in the 1956 coal lease. What Levisa asks the Court to do is really ignore the 1956 coal lease with Island Creek and, your Honor, that lease specifically granted Island Creek certain [p.251] rights.

First, it granted the right to dump water without regard to the source of that water and without regard to the lessor having to give any consent.

Secondly, your Honor, it granted this right and it is important enough that I would like to read it. I won't read many things. "Generally to make any use of the lease premises which lessee may deem needful or convenient in carrying on its mining or other operations." And, your Honor, there are no restrictions and there are no limitations on either the specific right to dump water or on the general right to use the property in any way needful or convenient to other operations.

I would like to take a moment and give you the relationship between Consolidation and Island. Prior to 1983 they were independent, separate companies that cooperated with each other in the mining and lease of the area. Through subleases Consolidation mined certain of Island Creek's

leaseholders, and that was done through more effectively, efficiently and economically mining **[p.252]** the coal mines in Buchanan County.

That resulted in more money, more royalties, millions of dollars of royalties being paid to the landholders in Buchanan County, and it was a benefit to the companies themselves in terms of being able to these keep [*sic*] miners on and boost the economy.

In 1993 Island Creek was acquired by Consol Energy Inc. and it became -- which is Consolidation's parent -- and subsequently Island Creek became, and is now a wholly-owned subsidiary of Consolidation.

In 1993 -- this storing of excess water in Island mines is not a new creation -- in 1993 these two companies, Island Creek and Consolidation, recognized the need to deal with the excess water being produced by their respectively held estates. They agreed as to how they would handle that. That agreement was for the excess water to be temporarily stored in idle mines and later removed, and I emphasize temporarily stored and later removed.

As applicable here, Judge Williams, Island Creek will move the water from Buchanan to VP 3 at **[p.253]** its expense. Consolidation has the responsibility to remove that water from VP 3 to the Levisa River pursuant to the standard by the DMME. Because of Consolidation's expertise in

terms of movement, storage, discharge of water, Consolidation has the administrative and functional responsibility to do this. In fact, Island Creek will bear -- the lessee will bear the cost of moving water to VP 3 and Consolidation will bear the cost of moving it to the Levisa River.

These agreements were oral in the beginning but are now memorialized by two contracts. One in March of '03 and the other in January of '03 that spell out the situation and spell out the obligations of the parties. And it is this arrangement that Levisa seeks to temporarily enjoin, specifically Island Creek's storage, temporary storage of the water in VP 3.

And as that relationship is Island's -- it is Island Creek that has the right to store the water -- it has entered into a contract with Consolidation and for the storage of the excess water from Buchanan and there is nothing wrong with that. And they are aware of that. The idea **[p.254]** that Consolidation is just a stranger and we don't know anything about that. They know about these contracts and certainly they know about the lease.

I would like to talk to you a little bit about the lease because they obviously disagree about that. Levisa says the water stored in VP 3 causes injury to the remaining coal in VP 3 and they have a loss of coal-bed methane gas. However, Levisa only has an interest in the coal estate and its rights now released

with respect to the coal estate are clearly governed by the 1956 lease.

Levisa has no ownership interest whatsoever. As you read the complaint you don't see how it says to the Court or anybody else how it gets its gas interest. It just says we have gas interest [*sic*]. The truth is Levisa had and hasn't had absolutely no interest, no ownership interest in the gas estate.

And two points should be made here. Levisa's sole rights with respect to the gas estate arise out of two royalty agreements between Levisa and the owners of the gas estate. Once the gas is extracted and sold, clearly and plainly its **[p.255]** only right there is to money damages.

Moreover, in the 1956 coal lease between Levisa and Island Creek there was [*sic*] the partners -- Levisa at the time -- expressly agreed that that lease, the coal lease, was subject only to gas leases outstanding on that date. There was no gas lease outstanding on that date. And in fact there was no gas lease until 1989, 33 years after the coal lease. The result to that is that Island Creek's right to VP 3 are superior to Levisa's rights with respect to the gas estate to receive any gas royalties.

I will talk a little bit about the coal estate and what has happened specifically in response to some of the things, and directing it specifically at VP 3. Island Creek mined VP 3 from 1968 until 1998. And in 1998 VP 3 idled.

Now, important, your Honor, Levisa does not assert -- here is what it doesn't assert -- it doesn't assert that it is wrong to have idled VP 3 in 1998. It doesn't assert that it would be economically feasible to reopen and recommence mining in VP 3 now or at any other time in the future, and it does assert that the coal lease has **[p.256]** been terminated.

So the claim that Levisa has with the respect to coal is neither irreparable or even damages because it is pure speculation. Why is it pure speculation? If the economic situation never improves to the point where it is economically feasible to reopen VP 3 then it doesn't matter what happens to the coal because it is simply uneconomical to reopen the mine.

So when Mr. Street stands here and tells you that that is a valuable asset and it is definitely being destroyed, the only way it has got any value is if it becomes to VP 3 to open VP 3 in the future. The point is that VP 3, through no one's fault, may never be opened and if so there is no harm to Levisa either irreparable or even in money damages.

What this means is that Levisa cannot meet the threshold burden of showing irreparable harm. The standards claim is entirely speculative and further any damages it might sustain are clearly compensable in money damages at a future date.

There are two other criteria and irreparable harm is the threshold of this case. **[p.257]** Just to touch upon the three other factors, and our evidence will show this and I will speak briefly to it, the

comparative loss to Consolidation would be, if the injunction is granted, is not only enormous but it is far greater than any comparable Levisa.

Third, the likelihood of Levisa's prevailing merits cannot be shown by them. And lastly, the harm to the public interest in the form of the repercussions to the community, to the people that work at the mines, to the vendors who are dependent upon the mines is enormous as well, and a factor that Mr. Street didn't mention in his opening argument.

I would like to give you an overview of the facts as the documents purport them to be, and as the witnesses will show. I want to go into some detail because of the critical nature of this hearing.

First, the operative agreements. The first operative agreement is a 1937 deed from Claude Post [*sic*] in a -- it is a 1937 deed which transferred to Levisa the coal estate. That conveyance was for "All coal, metals and timber together with all **[p.258]** rights, privileges, and easements incident thereto." Your Honor, that grant constitutes the entirety of Levisa's interest of the gas estate and in fact it constitutes the entirety of its interest in the entire estate.

Then you go to 1956 lease. This is Levisa's 1956 lease with Island Coal and since it truly is the governing document in this dispute, that Mr. Street talked about, it is the governing, controlling document as far as rights of Consolidation is concerned and I would like to point out certain --

First, Levisa leased to Island Creek the sole exclusive right to remove the coal. In addition, Island Creek was specifically granted, as mentioned earlier, the right to dump water or refuse by Consol. That is on page three of the lease.

I should add here that in article eight of the lease the location of dumps or disposal of refuse and waste material need to be approved by the lessor, but the lessor's consent is actually not needed for the location of any dumps. They distinguish the right to dump water and waste in **[p.259]** one place absolute and in another place qualified by the lessor's consent, but the right to dump water is not qualified. That is not in existence.

Importantly. with respect to a temporary injunction, Island Creek, and again the general, and I will just say general since it the most important from the standpoint of Island Creek, is granted the right generally to make any use of the lease premises that the lessee may deem needful or convenient in carrying on its mining operations. Obviously, the language is broad without any restrictions of the notation whatsoever.

Since this is a temporary injunction there are two provisions in the lease that mitigate against -- and we would suggest that it has to be a damages case. First, article two of the lease says that the tangible royalties on unmined coal in place -- and this is what Levisa bases its claim on -- shall be based on the fair

market value at the time such coal should have been mined.

Sometimes these leases are hard to read and hard for me to read because I haven't read many before. But what it is saying is that if the **[p.260]** lessee has got unmined coal, as stated in the lease here, that what the lessor is entitled to is he doesn't have to wait for that coal to be mined. He can come in and demonstrate that it should have been mined and in demonstrating that, he is entitled to make a recovery.

Not them, but he is entitled to make a recovery at the time -- excuse me, I am wrong -- he is entitled to make a recovery as of the time the coal should have been mined, and he has, obviously, the burden to prove that. He has to come before you. He has to show the coal is minable and he has to show that they should have done it and if he can show that, then he is entitled to be paid the fair market value. What it is clearly designed to do is provide a damage remedy for a lessor.

In addition, there is specifically a liquidated damage clause in this particular case. Article 11 and it says -- I promise you this will be the last thing I read to you -- "Parties to the coal needs [*sic*] to also agree that if at any time lessee shall not conduct its operation on leased premises as provided in the lease, and loss of **[p.261]** coal or other damage to the lessor thereby resulting or is threatened, lessee shall pay to lessor the full amount of royalty on the

estimated tonnage of coal lost or that may be unmined in the leased premises or at least it was a failure of lessee to conduct its operations." And here is a catchall, "And shall compensate lessor for the full amount of any damage that the lessor shall sustain."

What Levisa's remedy is, and Consol's is, is money damages and what the lease does is provide that they take [*sic*] cannot terminate the lease or enjoin Island Creek from its mining or other operations.

Let's talk about the gas lease. This is in -- excuse me -- this is in the coal lease. The coal lease specifically said -- the 1956 coal lease -- that it is expressly subject to all gas leases outstanding as of that date. There were none. The 1956 lease is not subject to the gas lease pursuant to which Levisa claims. In short, the coal lease is senior and the gas lease is the -- and that is a result that Levisa agreed to in 1956.

[p.262] Your Honor, the next document is an August 1989 gas lease. In this document Levisa and the folks at Combs' heirs executed what is called an oil, gas, and C.B. lease to a firm called Oxy U.S.A. leasing the gas estate to Oxy. I am not sure why Levisa is shown as a lessor on this lease because it clearly had no rights with respect to the gas. I suspect, and I will tell you this is just a suspicion, that Oxy knew that Levisa has the coal estate and perhaps out of some concern that coal-bed methane

went with the coal estate and made Levisa join in that lease.

But the simple fact is there is no document -- if it is, I would be surprised -- that shows Levisa had an ounce of interest, ownership interest in the gas estate. So they own it and their sole right is after this lease to Oxy then the Post [*sic*] and Combs' heirs entered into an agreement with Levisa and they only got those royalties, money -- the payment of money upon the contraction and the sale of the gas estate.

* * *

[p.274] Your Honor, the harm to Consolidation, if the injunction is granted, is enormous because you can't mine VP 3 unless you can move the excess water and they know that. If an injunction is granted Consolidation must begin immediately the process of idling that mine because of the water going into the Levisa. I don't want to bore you with the details, but they would have to start right away.

Buchanan is one of -- Buchanan 1 is one of Consolidation's most productive mines, one of the 20 largest underground mines in the United States. Consolidation has contracts with customers for the sale of that particular coal. They depend on it for a steady supply worldwide. If this coal is constrained and any extended shutdown of Buchanan will have a serious impact on this.

Buchanan employs -- the Buchanan mine employs more than 400 people with an annual payroll and benefits of nearly 30 million dollars; the buying and purchase of goods and services in excess of 60 million dollars, mostly from local vendors in and around Buchanan County. They are dependent on the mine for their livelihood. It is **[p.275]** expected to pay in 2006 in excess of 36 million dollars in taxes. One point six million will be paid to the county as well as an excess of a hundred thousand dollars to local charities. Most of its employees reside in Buchanan County.

The point is, your Honor, the harm to Consolidation is so beneficial that any benefit that Levisa would gain as a result of a temporary injunction is that it should be denied on that basis as well.

The same is true with respect to the bond. I am not going to bore you with bond requirements but the desire to grant the temporary injunction, we have evidence with respect to the bond and I will just say it is pretty substantial and the evidence will show we are entitled to a bond in excess of 600 million dollars.

I want to run through and apply the facts. What I have given you is the facts as they will dominate and they will dominate at this hearing and they will be proved in the hearing. So applying the documents will speak for themselves. The documents are

controlling. As much as I think Levisa might want to move away from the documents, **[p.276]** they are.

Your Honor, the basic -- so to apply those facts to the law, the basic statutes in granting an injunction shall be granted unless your Honor is satisfied with plaintiff's equity. While the Virginia Supreme Court has not set forth a specific case for this, Circuit Courts in Virginia have basically followed the Fourth Circuit on four factors.

And these factors all appear in piecemeal fashion in the Virginia Supreme Court decisions, but it is pretty clear -- at least it is pretty clear to me, that I think they control how your Honor should look at these. And they are: The likelihood of irreparable harm to Levisa if you deny the injunction; the likelihood of harm to the defendant, Consolidation, if you grant it; the likelihood that Levisa would succeed on merits; and the public.

For starters, Levisa cannot show irreparable harm as an extraordinary remedy to be granted sparingly and only in the limited circumstances. They are clearly without, particularly, your Honor, where the Court has to **[p.277]** act on an incomplete record.

The Courts have insisted that the plaintiff prove irreparable harm. While there are innumerable Virginia decisions extended on point, I found a simple statement from the United States Supreme Court that impressed me. Obviously, it impressed me because it seemed to be a good one, but here is

what it said for the Court establishes and the key word in this consideration is irrelevant.

"Mere injuries, however substantial in terms of money, time, and energy necessarily expended in the absence of the possibility that adequate compensation or other correct remedy will be available at a later date in the ordinary course of litigation weighs heavily against any kind of irreparable harm." And the case is Samson -- 415 U.S. 61.

Your Honor, first Levisa alleged harm. It is speculative and there are numerous reasons as to why it is speculative. They have to show that their harm is eminent and they can't show that.

* * *

[p.280]

Adequate remedy for irreparable harm. The rule of law says when you harm something and you are compensated by money damages the Court should refuse to find the harm irreparable. Even assuming, your Honor, that the water does cut into **[p.281]** the coal and gas reserves, the entry is greatly quantifiable and addressed by damages.

Coal and gas are commodities. They are quantifiable. They can be valued and reduced to money damages assuming the -- with our expert. Specifically the amount of coal reserves in VP 3 today is know and quantifiable. If water damages

the coal that will be learned if and when the coal is removed from the mine, and if that occurs the damages can be dealt with.

Indeed, you Honor, the parties have already considered it and provided this contingency and we seek -- by providing for damages. Specifically it provides that if the coal is not mined or it is threatened, then it can be calculated and royalties are paying for the lost revenue.

It says -- it goes further, the lessor is compensated for any other damages suffered. By the way, the lease also provides the lien to Levisa to insure that they get paid on the leaseholder estate as well as on other properties.

If Levisa asserts -- another thing they could assert because I am not sure it is going to **[p.282]** be asserted because the plaintiff doesn't speak to it, but they assert the water will increase the cost of reopening of the mine. That convenience. It is real easy. When the comes time [*sic*] to reopen the mine, they can come in and say they have been trying to charge us with respect to the cost of reopening the mine and your Honor can address that. If they try to deduct or add on as an expense the cost of removing the water your Honor can deal with that at another time.

Gas, with respect to the gas the VP wells have been in production for years. The gas reserves are quantifiable. The production data is well-known in these wells and if these wells lessen or stop

producing then Levisa will be able to calculate its damages.

The point is, it is about money and it is not about an injunction. I have spoken to the injunction issue that Consolidation will suffer a great disproportion of harm. And, your Honor, there is a play between the disproportion of harm and the likelihood. If the harm to the defendant is much more disproportionate if the injunction is granted than the harm to the plaintiff if it is **[p.283]** denied, then the plaintiff has to show a greater likelihood. And this is -- they will not -- they will not be able to do that.

The likelihood of a success story. This is the very fact I almost decided to reverse it, and make it the first because Levisa cannot show it is likely in the lease. The '56 lease is the controlling document between these parties. They ignored it and that is the reason they have sued just Consolidation.

We filed an initial motion -- when the initial motion was filed the judgment said Island Creek was a necessary party, which it is. They don't really want Island Creek in here but it seems that they do want Consolidation to help them out and be able to reserve the rights of the lease which is of course not so.

Levisa has not pleaded theory for its claim. You heard Mr. Street talk about trespass but you won't find trespass in the claim and I will tell you why in a minute. A plain reading of the lease, if you read the 20 some pages, but it has two primary points.

The first is that for Levisa has always [*sic*] **[p.284]** mined in connection with the coal removal, removed from the property-consistent with reasonable and proper expectations. For Island Creek the right to remove that coal unimportantly but generally the right to make any use of the lease premises either in the carrying on of its other operations, not just its mining, but its other operations. No restrictions, no anything.

And I suggest, your Honor, that Levisa is ignoring the lease's recognition, that they lose once the lease comes into play.

Let me deal with something simple that I sort of started with. Levisa references in its complaint, and Mr. Street mentioned it, about mining activities. Construction and passes made and shafts and access ways in the voids and I would like to speak to those because there are some interesting cases about voids. I think, your Honor, has decided some and I look at the lease and the void and the storage of water.

Island Creek mined the property for 30 years and in the process of it obviously these passageways and voids were created and exist. So who has the right to utilize these voids? Well, **[p.285]** the lease is in effect, still in effect. In fact it was renewed in 2001 and goes for another 20 years until 2021, and no allegation has been made, your Honor, that Island Creek has breached the lease.

I would suggest, your Honor, and I believe case law supports this, and the lease, that clearly Island Creek has the right to use these voids and the storage of water is not an improper, illegal wrong or in any way -- and I think this is important -- prohibited by the lease.

If Levisa had wanted to prevent Island Creek from storing the water in the mine voids from any place else and I would submit that under plain language of the lease, that Island Creek has the right to dump water and to make use of the property generally as it may be needful and to its operations; and part of its operations is its agreement with Consolidation to store the water.

This is not to deprive Levisa of its ownership interest in the voids, but that ownership issue is subordinate and the lease is very clear that they can't exercise their rights in any way to -- or on derogation of the coal **[p.286]** lease.

I will just comment briefly about a Supreme Court case, your Honor. It is the Stone Gap Collier versus -- case 1913, Supreme Court decision. It made clear that a lessee of real property has the right to use that leaseholder's property -- not only to carry on all purposes customary and expected in connection with its business of the property but also for any purposes not prohibited by the lease.

Here the lease didn't say anything about preventing the lessee from storing water and granted in addition specific rights. In terms of

contract interpretation I suggest to the Court that the lease and the other documents are clear and unambiguous and the Court can and should interpret the documents and I don't think extrinsic evidence is necessary or proper. And those leases are before you and can be taken by this plaintiff.

In the case of the following [*sic*] the Supreme Court's decision it was pointed out that the lease the sentence: "Any uncertainty from the language of the lease is to be construed strongly **[p.287]** against the grantor. And the facts and circumstances of its execution may be examined in any of/and not to vary this grant." And, your Honor, the grantor is Levisa. And the reason for that is that the lessor, here Levisa, is really in control. It has the control of the lease. It doesn't have to do that and so it can, let's just say, set the table and call the terms and it did here.

I have covered -- I am going to cover again the gas estate. I think the important point there is they have no interest in the gas estate. Trespass. He mentioned trespass in words that I didn't understand at all. It doesn't plead anything. Trespass is an unauthorized entry interfering with the owner's possession or interest causing some measurable damage. For reasons discussed, Levisa can't satisfy the burden of trespass or justify it here today.

Island Creek is the lessee. It is storing water. Under that lease it cannot be a trespass and for

these reasons stated, your Honor, particularly the '56 lease, the Island Coal Company and Consolidation contracts and with [p.288] respect to harm to coal and coal-bed methane Levisa cannot show.

I won't get into any detail except to say that our evidence will cover the harm to the public. Levisa cannot demonstrate -- and the injunction is not be entered because when you consider what Consolidation's 500 employees and their loss of pay and benefits in the millions that will not be put back into the economy, etc., etc., and the damage to the public.

For those reasons, your Honor, I would ask you to deny the injunction. We haven't had a memorandum and we are sorry to be so long.

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BUCHANAN

LEVISA COAL COMPANY, a Virginia Limited Partnership and L.L.P.,	:	
Plaintiff	:	Case No. CL06000408-00
–vs–	:	
CONSOLIDATION COAL COMPANY,	:	
Defendant	:	

November 16, 2006
9:00 a.m.

HEARD BEFORE:

THE HONORABLE KEARY R. WILLIAMS

* * *

[p.450] BY MR. SEXTON:

Q. Mr. Irvin, I am showing you Plaintiff's Exhibit 1, which purports to be a deed dated December 28th, 1937 from a Mr. Pobst and Mr. Combs to Levisa Coal Corporation. Is this the deed of the coal interest that Levisa Coal Company, the plaintiff in this case, holds today?

A. Yes, it is.

Q. Is Levis Coal company the successor to Levisa Coal Corporation?

A. Yes, Levisa Coal Corporation is now Levisa Coal Company, a limited partnership and LLP.

Q. Did there come a time when Levisa Coal Company or its predecessor leased this coal to Island Creek Coal?

A. Yes, they leased the below-drainage coal on, not all of the tracts, but some of the tracts, to Island Creek Coal Company.

Q. I am showing you a document that came into evidence yesterday as Plaintiff's Exhibit 2. Is that the coal lease to Island Creek for the below-drainage coal on your Levisa Coal properties?

A. Yes, it appears to be.

Q. Okay. I am going to ask you to turn to [p.451] page 3 of that document, Plaintiff's Exhibit

2. Did Levisa Coal Company or its predecessor reserve certain rights under this document?

MR. ALLEN: I am going to object to the witness testifying about the lease or his understanding of the lease. I think that is for the Court and not for any particular witness to tippy-toe through the document and start interpreting it, because that's your responsibility unless Mr. Sexton is going to say that this agreement is ambiguous and he wants to introduce extrinsic evidence.

I don't think Mr. Irvin was around in 1956 when this lease was prepared. I don't think he can do this. I object to it.

MR. SEXTON: I am not asking for any interpretation, Judge, yet, and I am not planning to. What I was going to do is just ask if this is an exemption and revisions clause and if he is familiar with it.

THE COURT: All right. Go ahead. Objection is overruled.

[p.452] BY MR. SEXTON:

Q. Did Levisa Coal Company or it [*sic*] predecessor reserve certain rights under this lease?

A. Yes, they did.

Q. Is that reflected on page 3 of the lease?

A. The pages, the lease that I am looking at doesn't have page numbers, but there is a header

that says, "Exempting and reserve to lessor." And that's --

Q. On the third page of the document?

A. That's correct.

Q. I would like to direct your attention to article 17 of the lease which is, since it is unnumbered you will have to flip through, but it's six pages from the end.

A. Yes.

Q. In the, in this coal lease which Levisa Coal or it [*sic*] predecessor entered into with Island Creek, did it reserve the right to have to consent to any assignment of the lease?

MR. ALLEN: Well, my objection is when he testifies like that that yes, certain rights were reserved to the lessor, then in a **[p.453]** way he is interpreting the lease. That is what this question is intended to do. Whatever rights were reserved to lessor, the document is going to speak for itself and Your Honor is going to make those findings.

THE COURT: The lease speaks for itself, obviously. I don't know really what the purpose is. I can't imagine that counsel is offering the witness and asking these questions to interpret the lease to the Court, the Court certainly is going to do that.

MR. SEXTON: Right. We take the position that the lease is unambiguous just as Mr. Allen does. So we are not offering it as extrinsic evidence. As old as

he is, I don't think Mr. Irvin was there when it was signed, either.

THE COURT: I would be offended if he said that. If you just need to point that out, the Court recognizes that certainly and will examine that article of the lease and make any decision that the Court is called upon to make.

MR. SEXTON: There is a question that **[p.454]** relates not to the interpretation.

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[p.623]

THE COURT: Plaintiff rests?

MR. SEXTON: Yes, Your Honor.

(Plaintiff Rests.)

MR. ALLEN: Your Honor, I would like to make a motion. Judge, we are pleased to put **[p.624]** on our case, we have a lot of people hanging around for two days, but we don't think we should have to for the following reasons.

I am going to combine this under one argument, although the argument of Massie v. Firmstone with respect to Mr. Irvin's testimony, their case can't rise any higher that [*sic*] his testimony with respect to the facts within his knowledge. He is not an idle person from Levisa. He is the general partner. He has, I think, some authorization, agency agreement to speak for them. And he has done so.

Their case fails, and I will just deal with one narrow point of it, with respect to irreparable harm. If you deal with the other issues, we haven't gotten to showing the harm, but you can get the picture. We have dealt some with likelihood to win, and the public interest. But the threshold issue is irreparable harm. I would like to limit my comments to that.

The testimony is and it is uncontradicted, not just from Mr. Irvin, the **[p.625]** mine was idled in '98. There is no question about that. There is no question but that it, there, that it needs, that it

should be reopened now because it is economically feasible. There is no claim that there will be a time in the future when it could be economically feasible to open this mine. And it is a given that coal may never be mined again in VP-3. Not because anybody has done anything wrong and not because there is water there, but because the economic conditions may not allow for VP-3 to be opened again.

And so the whole idea is the damages are not -- the damages, first, are speculative. Second, they are just not irreparable. By virtue of the plaintiff's own testimony, you can calculate the coal reserves that are there. The lease specifically provides that if these reserves should be mined and aren't mined, then royalties are to be paid based on that. There is clearly an adequate remedy at law.

So not only are the damages totally speculative, but they clearly aren't **[p.626]** irreparable. We really don't have to offer, say anything about the gas estate because they haven't offered any testimony on the gas estate. They have no expert to say there has been any harm to the gas estate at all. But even if there is, the evidence is clear that what the plaintiff is entitled to is royalties only, which are clearly money damages.

So Your Honor, they fail the threshold standard and the threshold standard has a number of words for short definition, and as you can see they fail them all. "Imminent, irreparable harm," nothing is imminent. As far as being irreparable harm, it is

not, which is neither speculative, it is speculative, nor compensable in money damages. And clearly it is compensable money damages.

Mr. Irvin's testimony, I think, said it all, but the additional evidence they offered, which was by Mr. Ramsey and their two experts, just didn't help their case at all. They have clearly not begun to carry their burden of proof to get a temporary injunction.

THE COURT: Mr. Sexton.

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[p.650]

MR. ALLEN: May I reply? Saying something over and over again doesn't mean it **[p.651]** is so, it doesn't get any better. I am not going to comment on a lot of the things he says, it is like a closing argument. My position was pretty narrow. Mr. Street never addressed it.

Let me just sort of state what it is. First, the standard is irreparable harm. He never wanted to use the word "irreparable harm" because that happens to be the standard in a temporary injunction hearing. He hasn't proved it. To his credit, he didn't even argue, he didn't even bother to do that.

He cited you a lot of cases. But he said something that is really bothersome. He is telling you actually that the State of Virginia has not adopted the Black letter decision. I will tell you that is crazy. Of course they have. I don't think anybody would stand up here and say they haven't. The only thing that has not happened is the Virginia Supreme Court has not expressly said, "We adopt this."

What we have is 25 to 50 Circuit Court decisions all over the place. When it goes up **[p.652]** to the Virginia Supreme Court in piecemeal fashion it has adopted every one of these. I am not going to repeat the four factors to you. It is not credible for anybody to say that Virginia hasn't adopted that because they have. And irreparable harm is the keynote of it.

They haven't even come close to showing irreparable harm.

The cases he cited you, I am not going to deny that injunctions are issued in cases of trespass and easement and all that. They are permanent injunctions. He stood up here and cited cases that don't deal with temporary injunction, but instead a permanent injunction.

At the end of this case, when all of the evidence is in, we don't think you will conclude this. But you could well have the power because irreparable harm is not the standard. It is any harm at all, even if it is compensable in damages. We think you will have the power then to end the injunction.

Judge, I am not going to go through this lease the way he did. What I am going to tell **[p.653]** you is when you read the paragraph that he went over, the paragraph that talks about dumping water, you will see how in his structure, and you will see it starts "Together with," and then it gives you the surface rights. Then you will come down and there is a semicolon. It says "Together with," and then it spells out other rights. Then it comes down and there is another semicolon. It says "Together with," this is where it talks about the right to dump water and the right to use the property for other purposes.

So the idea that this is all one big sentence that deals just with surface rights, we would disagree with that. We think when you read it you will see

three separate clauses, the last of which should not and cannot be connected to surface rights.

And Your Honor, I want to point out one other thing in this lease because I believe that on its face it puts this lessee, Island Creek, on a literal parody with the lessor, Levisa. It is on, pages are not numbered, but **[p.654]** I think it is on page 4. You can listen to what it says, very simple sentence. First, it makes the reservation of certain rights to the lessor. And then it says quote -- could I wait for you to find that, Your Honor? Plaintiff's Exhibit 2.

THE COURT: What page?

MR. ALLEN: This would be the fourth page, Your Honor. Reference was made to the second page because I wanted to point out -- I don't think that it's necessary to go through this -- but this idea that that entire paragraph deals just with surface rights, I don't know what is the basis for saying that. Those clauses are separated by semicolons, not by commas. That second phrase starts with, the first one on surface rights, "Together with," and then it deals with surface rights.

Then one starts and says "Together with excavations," and "dumping water." And then you come down and there is a semicolon and it says, "And generally," semicolon, "And generally to make," listen to what it says, "any use of the leased premises."

[p.655] Well, these premises is not just the surface. Leased premises is everything. That is

what it says. And if it had meant surface it could have said that. If it meant to -- here is another point Mr. Sexton emphasized. He said, "This is only for mining. Island Creek can only use this for mining." It says, "Mining or other operations." Yeah.

And one tenant of contract construction, you have to read the whole contract. You can't pick out words or phrases that you like. I am not going to do that and no one should. It is incumbent on you to read the whole contract. But I want to refer you over to page 4. Pretty simple phrase. It is at the end of the first paragraph. This is after the lessor has reserved for himself some rights. Listen to this, quote, "Any and all such rights and privileges hereby accepted and reserved shall inure to the benefit of, and may be exercised by lessor and his successors or assigns, and by any and all other persons, firms or corporations which may in any way claim by, through or under lessor."

[p.656] Well, guess who is one of those people, Your Honor? We are. And so essentially the lessee here has been granted the co-extensive rights with the lessor. And from a lessee standpoint, that is exactly what you want to do. You want to be able to have complete use of the property.

Now, Mr. Sexton wants to stands [*sic*] up here and act like he was around in 1956. I wasn't, or he wasn't. It was a great time, I was 16 years old, and those were the best of times. But nobody is going to

be around that knows anything about this lease in terms of the facts and circumstances there.

I would suggest to you that the lessee's rights to this lease are extremely broad. I don't really see how they could be any broader. And importantly, the rights are not prohibitive. There is nothing in this lease to prohibit Island Creek from dumping water; from dumping water, from storing water, from putting the premises to any other proper and legitimate use.

I am not going to stand here and tell **[p.657]** you as Mr. Street did that we can do anything with it. Of course we can't. I think when waste and destruction become involved, then that becomes an issue. I wish I had answers for you on that issue. I am not prepared to answer those today because the standard is irreparable harm. They haven't even begun to show that.

In addition, the parts of the provision of the lease that he wants to run away from are royalty provisions. The lease makes it very clear that if Island Creek doesn't mine the coal that should be mined or because of its actions there is loss or threatened coal, then calculations can be made and damages can be paid. Again, not irreparable damages.

He said the things, that coal expert stood up here and told you about the harm and everything. There wasn't a single word out of the mouth of that coal

expert that indicated that any harm was irreparable. That is the basis for our motion.

Before I sit down, I just want to mention Island Creek. Our witnesses have not **[p.658]** testified. Mr. Street has tried to create the impression that Island Creek is a phantom. Island Creek is not a phantom. Island Creek is a real, live, well and healthy company. It just so happens that it had mining operations here until April of 2006, as Mr. Ramsey testified to. When it ceased those mining operations it doesn't have any employees in this area. The important thing about Island Creek is it is a real company and when it comes around to it we will prove that to you.

It has rights and assets. One of those rights is the right to use VP. What it has done is it has contracted with Consolidation to allow Consolidation to store excess water in the idle mines. You know, Your Honor, that is a perfectly legitimate thing to do. When we have a chance to prove our case we will get away from, I guess the aura that Mr. Sexton tried to put over Island Creek and demonstrated, but for right now there has been no showing of irreparable harm. That is the threshold, the first requirement. For that reason the plaintiff's, the motion should be **[p.659]** denied.

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